DRAFTING OF INTERNATIONAL CONTRACTS

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PREFACE

Drafting of international contracts is a very big work which cannot be treated with regard to all sorts of contracts at a time. We have to choose a certain area of international contracts to deal with in depth.

For this reason, we preferred to deal, in general, with international contracts of sale, being the most important area in international trade; and to deal after that with a specific area of international financial transactions which is: financial facility contracts. The relations between the two areas cannot be ignored.

Our work then is divided into three chapters:

Chapter I: General considerations for drafting.

Chapter II: International sales contracts.

Chapter III: Financial facilities contracts.

The Author

CHAPTER ONE

General Considerations for Drafting International Contracts

Kinds of Contracts:

International contracts may be contracts of a small value and do not need much work in drafting to avoid high expenses; and may relate to considerable amounts of money or capitals and this kind can afford the high cost of drafting usually demanded by experts and international law firms, as it takes much effort and time (may be several weeks or months). Different kinds of experts, other than legal experts, may be invited to participate in negotiating and drafting big contracts, such as experts of : taxation, environment, intellectual property, engineering and architecture, etc.

There is no uniform form for an international contract which is suitable for all purposes. General conditions laid do not prevent negotiating special conditions.

Negotiations:

The contract may be drafted by the drafter of one party and left to that party to discuss it with the other party; but this is not suitable in most cases because the drafter should participate in negotiations, at least where the other party uses the services of his legal consultant during

negotiations, and where the other party has a counter-draft of the contract.

As a drafter you may be invited before drafting to participate in negotiations or may be asked to make a draft contract to start negotiations upon it, or you may be a member of a drafting group. But, as a legal man, you do not negotiate solely, but mostly you are a member of a team of negotiators taking the legal role, like every other member takes his role according to his qualifications and specialisation.

Negotiations begin on its opening by parties exploring the situation of each other. Bids may be offered, exchanged, discussed and approved or disapproved after short or lengthy negotiations. Concessions may be granted from either side according to the strength or weakness of its position and to its negotiating skills. Negotiations may succeed and a contract is concluded; and may fail and stop for further negotiations on a higher level or may be stopped for ever.

To have fruitful negotiations, parties have to agree on a time table and on a list of points to be negotiated if possible. If you are a member of the negotiating team, do not give all information you have at a time, but do it gradually, to see its reaction on the other team.

Negotiations may be branched to other fields around the contract and may need to be controlled, by giving priority to essential matters and then to ordinary or minor questions.

Horizontal or vertical negotiations:

Negotiations may be continued on each subject by discussing it altogether in a horizontal manner, and may be continued by discussing the contract article by article until its end, i.e. in a vertical manner.

Negotiations include: conversations, consultations, communications and/or correspondence exchanged. In English law each party has the liberty to terminate negotiations at any time, as they do not have a contractual nature or a binding character, and there is no obligation to conduct negotiations in good faith.

In civil law countries different principles prevail, as each party should:

1. be in good faith and co-operate during negotiations. If a party refuses reasonable proposals and suggests unreasonable ones to waste time, then he is not in good faith;
2. conduct serious negotiations. They are not serious if a party knows his inability to implement the contract;
3. be fair and correct. A sudden unjustified withdrawal of negotiations reaching a final stage is neither fair nor correct.

There are three types of agreements regulating negotiations:

1. An agreement to negotiate which is not binding nor enforceable in English law.

2. An exclusivity agreement or lock out agreement: providing for an obligation **not** to conduct negotiations during a certain period with a third party, and such agreement is binding.
3. A confidentiality agreement during negotiations, is also binding.

Translators:

Parties in international contracts are usually from different countries and continents and speak different languages, and for this reason they need interpreters during negotiations and drafting. The interpreter should in advance have the agenda of the meeting in order to be aware of the subjects under discussion.

It is difficult for one interpreter to work with the same efficiency for several hours. So, you have either to give him regular breaks or you have to arrange for a substitute.

During meetings, speakers have to raise their voice to enable the interpreter not to miss any word. They have to speak slowly and to repeat the meaning in other words if they feel that the interpreter stopped. They have to stay after every one or two sentences until the interpreter finishes. Double negatives should not be used to avoid misinterpretation (Study Group: Drafting International Contracts 1997).

Translation may not be accurate. If we translate from English into French the word: director as "directeur", this will not be exact, as director means "administrateur"

(member of the board of directors); while "directeur" in French means "general manager " in English.

Different legal systems involved:

Where different legal systems are required by the parties, a compromise will often be necessary to satisfy different needs, and this may lead to asking for the services of more than one law firm. For instance, where parties from Egypt deal with parties from England, two international legal systems are involved: the Latin (adopted by Egypt and inspired by France) and the Anglo-Saxon or the common law system (adopted by England). The principles governing contracts differ on numerous points in the two systems, and drafters from both systems may participate to achieve such contract.

Ways of Drafting:

The French pattern of laws (adopted in a large number of states in the World) contains detailed provisions for every point whether in the general theory of sources of obligations or in the provisions of nominated contracts. Drafting of local contracts in this pattern of laws does not need details except where parties want to derogate from the supplementary rules of the governing legislation, but where they want the provisions of this legislation they do not have to state them in detail and a mere reference in one article to the provisions of such legislation is enough to form a complete contract, by saying : " all issues and matters not provided for in this contract shall be subject to the provisions of law No. ... ".

The matter is not so in the Anglo-Saxon system or the common law system, because provisions are mainly inspired by precedents, and to cover all areas of precedents, you have to draft a very lengthy and detailed contract. The study of the "law of contract" is extracted from precedents which cumulated over years and centuries.

This second mode of drafting contracts prevailed in international contracts over the French mode.

Global view:

If the drafter feels drowning in details, he has to look to the contract from a high point, like a bird looking from the sky at things on the earth. This look will aid you to see all the contents of the contract.

Contents of the contract:

An international contract is usually classified to chapters, sections, articles and points or paragraphs. An international contract may contain the following:

Date; parties; preamble; definitions; interpretation; representations; warranties, scope; price or other consideration; payment terms; method of payment;

delivery; variations; title; risk; insurance; responsibility; liability; exclusion or limitation of liability; specific performance; liquidated damages; frustration of contract; hardship and force majeure; default and its consequences; fundamental breach; assignment; tests; inspection and certification; representatives and authority to sign the contract; confidentiality; right to audit; entire agreement; withholdings; dispute settlement and governing law and jurisdiction; guarantees; notice provisions; agent for service of process, waiver; others (Study Group, op.cit).

This classification may be followed in this order or may be altered otherwise as the drafter may deem fit.

Time for drafting:

Clients are always hasty, and do not give drafters enough time to prepare a contract which secure their interests. Any problem which your client may face as a result of such acceleration will be a black point on your front. So, take enough time to draft and increase working hours as much as you can, instead of speedy work.

Language of drafting:

Recent international treaties, such as that of international sale of goods, avoid to use technical legal terms of a certain system which are not agreed upon by other legal systems, and try to simplify the ideas and the provisions used. International contracts usually follow the same

trend and it is said that these contracts have to use a " lingua franca" i.e., a liberal language which gives a clear meaning agreed upon by parties without being indulged in sophisticated legal matters.

Clarity:

Clarity in drafting terms of an international contract is very important to prevent future disputes and to prevent each party from fleeing from its obligations.

Implied terms and trade usages:

The drafter of an international contract should care to state the implied terms which suit the position of his client and/or he may state custom and trade usages as source of rules, or he may make a derogation therefrom where they impose much liabilities on his client. The other party will negotiate such terms and try to achieve a compromise.

Drafter for both parties:

It is not advisable to draft an international contract upon request from both parties, and parties do not accept it. If the contract is of a small value and parties put the burden of drafting on you it is difficult to be fair unless you consult an international convention such as that of sale of goods, or any other model document.

One-sided contract:

This is the opposite case: you do not draft here for both parties, but you are drafting to one of them, and you try to give him almost all advantages and to deprive the other party of most of them. This may be viewed as a one-sided contract which is contrary to the duty of good faith in international transactions provided for in the Convention of International Sale of Goods of 1980 (Vienna Convention) and in international trade in general. In the English courts the one-sided contract may be considered unreasonable according to the laws of consumer protection. In areas other than consumer protection the court may try to reduce the effectiveness of contract clauses and conditions.

Fill in the pistol before shooting:

This is a translation of an Arabic proverb. It means that you have to gather all information and data about the contract before drafting it. You have to know the subject matter of the contract with ample details. You have to know the other party and his purpose and what consideration will be presented by it, and so on with all other matters relevant to the contract. You have to put information in a logical order. Some of the information you have gathered are not final and will be subject to negotiations and your client should point out that for your information.

Standard terms:

There are two sorts of terms: standard terms and specially negotiated terms. Standard terms are drafted for daily use in practice and cover hundreds or thousands of contracts. Such standard terms are usually drafted either by lawyers and legal advisers or by in house lawyers. They may also be drafted by the producer or distributor, or may be copied from current clauses in the markets or from reference books containing specimen contracts. On the other hand specific terms are drafted for a specific contract.

Contracts of adhesion:

Standard terms are often used in contracts of adhesion, where one party lays down them and refuses to be negotiated around them. The other party has a very limited choice: either to accept them *in toto* or to refuse to conclude a contract at all. Drafting standard terms takes care mainly of the interest of the party who offers them, gives him a free hand to act and to be protected, but restrict the right of the other party to the extent such restriction can be validly made.

It must be noted that not all standard terms are contracts of adhesion, as some of them may be negotiated and the standard form may be amended.

Specially negotiated terms, on the contrary, are not imposed on the other party like contracts of adhesion and they can be negotiated.

We are not going to deal with contracts of adhesion, because they are unchangeable, but our concern will be the terms and conditions that can be changed pursuant to discussions conducted by parties.

Battle of the forms:

Each party may have a legal representative in negotiations, specially in significant contracts. Each legal representative has to care for the interest of his principal and, as a drafter participating in negotiations, you have to bear in mind the fact that you are the representative of your client or your boss, and your task is to fulfil for your client the most favourable terms and conditions you can achieve. You may be charged to draft a standard form of terms, and the drafter of the other party may also be charged to draw a form representing the viewpoint of his client. You meet with the other drafter armed with your form and he, in turn, raises his form and the battle of forms commence. In a contract of sale each of the buyer and the seller considers his form a base, and in this way the conclusion of the contract reaches a deadlock, except where forms are exchanged and negotiations begin to agree on identical terms and discuss different ones, and by mixing the two forms after successful negotiations the contract is concluded. (Bradgate: p. 128).

If the forms and discussions are exchanged by correspondence, each party may reply by insisting upon his form as it is or after amendments. It is said in such case that: either a party yields at last to the form of the

other party; or the party who fires the last shot is the winning party and this means that the other party does not object the form of the winning party. In case of dispute on a sale, for instance, the court may consider that one party had by its conduct accepted the terms of the other and waived his terms, by retaining the goods sent and renouncing to return them back to the seller for non compliance with his term form.

Shots during the battle:

Each drafter aims at passing the risks of the contract from his client onto the other party, or to alleviate the liability of his client in relation to such risks. Here is an example for the attempts of both sides to a contract of sale:

The seller wants to precise the consequences of breach, if buyer fails to collect the goods. Seller may put a term as follows:

"Where the buyers do not collect goods at destination after having been notified to do, the seller shall have the right to terminate contract without any further notification and may exercise any or all of these rights:

"1. Request damages from the buyers for the loss or deterioration of the goods or for expenses relating to transport;

"2. Sell all or part of the goods to other buyers at market price and request difference(s) from the buyers;

"3. Recover damages for profit lost as a result of buyers' abstention;

"4. Request interest on sums due in application of the preceding paragraphs at the rate of 7% to be calculated as from the time buyers have been notified of the arrival of the consignment;

"5. Liability of buyers shall be joint and several" etc.

Buyers may, during negotiations, argue that:

1. There is no need for such term.
2. A sole notification is not enough, and a second notification must be sent due to the gravity of consequences of termination.
3. There is no room for damages and it suffices to have the difference of price if any.
4. Seller must not be in breach of any of his obligations as to times of supply, fitness of goods and quantities supplied, etc.
5. Buyers liability may have a ceiling not to be exceeded.

Assume that these attempts failed; buyers may use their right to insert a corresponding term to safeguard their interest saying that:

"Where seller is in default of non delivery of goods and documents of title thereof, during the periods defined in this contract and in accordance with its terms and conditions, buyers shall have the right to terminate

contract without notice and may exercise any or all of these rights: 1. 2. 3.etc

Principles for drafting:

Here are some principles to be followed in drafting:

1. Use short sentences where possible.
2. Use the active mood as much as possible.
3. Use the present tense.
4. Actions are to be expressed by shall, to express a mandatory action.
5. Do not put a lot of provisions in one article, but make several articles and make reference to one another if need may be. In the case of commercial agency for the sale of gearboxes for example reference can be made as follows: "Y hereby grants to Z the exclusive and non assignable representation of the (F2000) gearboxes, the components and specifications of which are defined in schedule A of this contract and designs of which are shown in schedule D annexed to this contract, within the territory limited in article 13 of this contract for the period of five consecutive years, beginning ...etc.".
6. Use simple language.
7. Use numbers for terms (this will be explained later).
8. Define rights and obligations of parties clearly, and give necessary definitions.
9. Do not tear first drafts until the end, keep them folded aside.

10. In drawing up the contract parties should take into account the law applicable to the contract and different

types of relevant mandatory legal rules of an administrative, fiscal or other public nature in the country of each party. Parties may examine standard clauses or previously concluded contracts, but they may not be adopted without critical examination. Parties may wish to clarify the extent to which oral exchanges, correspondent and draft documents which came about during the negotiations and which may be used to interpret the contract.

11. A purchaser from a third world country may need technical advice in drawing up the contract to supplement his own capabilities.

Some writers (George Goode) suggested that the legal sentence should contain:

1. Case: i.e. The circumstances in which the sentence applies.
2. Condition: i.e. the acts which must be done to make the sentence operative.
3. Subject: i.e. the person entitled to take action.
4. Action: which may be taken.

For instance: "If the seller notifies to the buyer that goods are ready for delivery (case) and the buyer fails to receive (condition) seller (subject) may arrange the necessary stores unless the goods are perishable, and may claim storage expenses and other damages from the buyer (action).

Uses of words:

There are some words that are used in more than one meaning and when using such words the drafter must make the intended meaning clear. For example: the word execute has three meanings: sentencing a criminal to death; signing a contract and implementing a contract. The first meaning is irrelevant in matters of contracts, but the other two are related and the drafter has to show which meaning is intended.

The word damage, used in the singular, means the loss; and in the plural (damages), means the reparation of the loss.

The word eventually may mean possibly and may mean at the end of.

The words 'must' and 'should' are used in the same meaning, but indeed there is a difference between them: "must" means that no case can be excepted, "should" means that few cases may be tolerated.

The words 'means' and 'include' indicate different things: "means" makes the meaning limited to the case(s) specified after it; but "include" means that the case(s) stated after it is/are not limitative and may come among other cases. For instance, "IP" means copyright (the meaning is that one sort of IP is intended: copyright). But if we say: "IP" includes copyright, the meaning will be different, because copyright is meant and other sorts of IP are included, like trademarks, inventions and trade names.

The words "debtor" and "creditor" are usually used to indicate a duty or a right to pay a sum of money to such person. If the subject matter of the contract is something other than money, the words "obligee" **and** "obligor" are used. But it is noted, however, that the Convention of International Sale of Goods has used the expressions "debtor" and "creditor" to mean all kinds of obligations, for the sake of clarity and simplicity or a "lingua franca".

Using the words "and/or" may be conjunctive or dis-conjunctive. For the sake of safeguarding the interest of your client state that your client "may exercise any of the said alternatives alone or in any combination".

Time periods:

The contract may provide that: "All periods stated in this contract start from the day following the date of occurrence of the event from which such period runs".

Drafting of standard terms:

The drafter has to care for the following while drafting standard terms:

1. Common law countries use precedents in drafting, due to local historical reasons. If the use of such precedents is necessary, an English solicitor or jurist should be added to the group of drafters.
2. The drafter should know the nature of his client's business, his products, his customers and problems.

3. The drafter should take the instructions from suitable representatives of his client's business, and in writing if possible. The suitable person may not in some cases be the managing director, but may be the engineer in charge.
4. The drafter should know about his clients products: are they of high or low value and their uses. The drafter of a seller may limit the liability of his client for defects resulting from failure to follow instructions, or from misuse by persons other than the technicians of the seller, or from the fault of the first manufacturer of components. The drafter of the buyer may stipulate the contrary or may render such aspects to be within reasonable limits using objective criteria and not personal criteria.
5. The drafter may advise cover insurance to be undertaken.
6. The drafter has to know if the goods are going directly to the buyer or indirectly, and in the latter case if they will be subject to a process.
7. The drafter should examine current clauses in rival institutions.
8. The drafter should examine conditions of trade associations to which the client or the other party may be a member.

Kinds of clauses:

a clause is a single paragraph or subdivision of a legal document and sometimes a sentence or a part of a sentence.

Clauses of contract are classified to be: terms, articles, sections, items or conditions. The word term may be used as synonymous to clause, and may mean time granted to a debtor for discharging his obligation.

The word terms means a text of a contract, but the contract does not specify consequences of breach thereof. There are express terms and implied terms.

The word condition or condition precedent means a stipulation precedent upon which the contract depends, and any breach thereof gives the other party the right to terminate contract and to claim for damages.

The word warranty means an undertaking of a party that such party guarantees to do or not to do something, and its breach gives the party not in breach (the innocent party) the right to claim damages but not to terminate contract.

Accordingly, a **term** may be made a condition or a warranty. It becomes a condition if the buyer stipulated that: ".. if the seller breaches (a certain term), buyer may reject goods and may repudiate and terminate the contract".

The term becomes a warranty if the seller stipulated that: "the buyer will accept goods even in the case of late delivery which does not give rise to termination of contract".

Contra proferentem:

The drafter must, as aforesaid, endeavour to avoid any ambiguity, specially in relation to exclusion of liability clauses.

Any derogation from this principle makes the party he represents subject to the Latin rule: "contra proferentem" which means that any ambiguity of a clause ought to be interpreted strictly, contrary to the interests of the party who drafted or suggested it, known as "proferens" (Bradgate: p. 30- 32).

There is a good example for the application of this rule which is known in English law and in the Unidroit Principles: a park pointed out in the front that "car parked here at owner's risk". A dispute arose and the court construed this ambiguous declaration to mean: "car parked here at park owner risk" and common law permits such interpretation which is known as contra proferentem.

Definition of contract concepts:

In Common Law countries there are meanings inherent in some words relating to the theory of contract, here are some of them.

1. Agreement: a concord of undertaking and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performance. A manifestation of mutual

assent on the part of two or more persons as to the substance of a contract.

2. Contract: an agreement between two or more persons which creates an obligation to do or not to do a particular thing. A promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty.

3. Liability: an obligation one is bound in law or justice to perform. An obligation which may or may not ripen in a debt.

4. Responsibility: the state of being answerable for an obligation, and includes judgment, skill, ability and capacity.

5. Damage: loss, injury or deterioration, caused by the negligence, design, or accident of one person to another in respect of the latter's person or property. The word is to be distinguished from its plural (as aforesaid) "damages" which means a compensation in money for a loss or damage.

6. Frustration of contract: this doctrine provides, generally, that where existence of a specific thing is, either by terms of contract or in contemplation of parties, necessary for performance of a promise in the contract, duty to perform promise is discharged if the thing is no longer in existence at time for performance. Some writers (R. Bradgate) consider the contract frustrated by some event which make performance impossible, illegal or substantially different from what parties anticipated, provided that the frustrating event must be something which was unforeseeable at the time the contract was made, and that a party cannot claim frustration for his own actions.

7. Hardship: is an event making performance onerous than anticipated.
8. Injury: any wrong or damage done to another, either in his person, rights, reputation or property. The invasion of any legally protected interest of another.
9. Condition: a future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. A clause in a contract or agreement which has for its object to suspend, rescind or modify the principal obligation.
10. Condition precedent: is one that is performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties (ex. This contract shall not enter into force except after the preparation of the premises of buyer).
11. Condition subsequent: is a condition referring to a future event upon the happening of which the obligation becomes no longer binding upon the other party (ex. The contract is awarded under condition subsequent that the buyer shall buy the minimum quantities provided for in appendix A).
12. Warranty: a promise that a proposition of fact is true. An assurance by one party to agreement of existence of fact upon which other party may rely. It is intended precisely to relieve promisee of any duty to ascertain facts for himself, and amounts to promise to indemnify promisee for any loss if the fact warranted proves

untrue. In certain circumstances it is presumed, i.e. implied warranty.

Preparing for drafting:

You have to put on your desk before starting to draft all relevant legislations and reference books. You have to prepare the names and addresses of law firms you may consult. You have to consult, in case of need, some embassies (specially the commercial sections) and may be some international banks, upon reference from a party.

In case you consult legal firms, do not forget at the time of signing the contract to update the legal opinions of these law firms.

You have to ascertain of the following:

1. The statutes you gathered, to what extent can they be derogated from or varied.
2. The trade usages and whether they have binding effect.

In case you are drafting for a BOT project, there are several contracts to be drafted and you may participate in some or all of them. For instance, there are contracts for :
-the project company,
-the consulting engineer,
-the feasibility study,
-the supplier of equipment or lessor,
-the contractor making designs,
-the contractor making construction,
-the company of management,

-the supplier of energy,
-any other operations.

There is conflict of interests among a lot of them and you may represent homogeneous interests. But you have to know details about contracts in which you did not participate.

In case negotiations are conducted without your participation you should be briefed about them.

While using common expressions, do not think that they all have a common understanding. American, English and Canadian dictionaries may give different meanings and uses. The safest way to skip this problem is to give definitions of your own for such expressions.

You have to note also that definitions vary in different zones of the World. For instance: incoterms of the ICC give meanings different than those of the US unified commercial code, and this must be taken into consideration while drafting in order to exclude one of those meanings or both of them and give a different definition.

Importance of punctuation:

Although this seems to be a scholar concept, it has sometimes, however, a legal impact. Let us take these two examples:

The girl said, the boy is nice.

The girl, said the boy, is nice.

These two sentences contain the same words, but indicate different meanings. The nice person is different: in the first sentence it is the boy, and in the second it is the girl. This difference came from the place where you put the comma.

CHAPTER TWO
INTERNATIONAL SALE CONTRACTS

In this chapter we do not deal with concepts relating to all contracts, but we are interested here with how to draft an international contract of sale.

The international character of the contract:

It is of primordial importance to know when can the sale be of international character. There are several criteria such as: the nationality of parties (personal criterion), or the existence of transport abroad, or the exchange of offer and acceptance in two different states, or effecting delivery of goods in a state other than that where offer and acceptance has been exchanged (material criteria).

The UN International Convention on the sale of goods (which will be commented near the end of this chapter) provides in article 1 that the sale of goods becomes international where the places of business of the parties exist in two different contracting states, or in a non-contracting state if the rules of private international law lead to the application of the law of a contracting state.

The choice of one or more of these criteria may be subject to negotiations, and you may choose the best for your client.

Pre-contractual documents:

Pre-contractual documents may be one or more of the following kinds:

1. Letters of intent.
2. Comfort letters.
3. Heads of agreement.
4. Preparatory contract.
5. Temporary contracts.
6. Letters of understanding.
7. Partial contracts.
8. Invitation to tender.
9. Covering letters
10. Forms of the other party.
11. General conditions of the other party.
12. Telexes and faxes to explain.
13. Minutes of meetings.
14. Opportunity studies, feasibility studies and detailed studies.
15. Any other documents suggested by parties.

Such documents met during negotiations may be drafted by you or your assistant.

Pre-contractual documents may be considered in the French, Swiss and Middle East civil laws, as means of interpretation of the terms of the final contract, while in English law and similar laws it may not have any effect unless otherwise stated. It is better to settle this point in the final contract by stating whether or not they are part of

that contract or can be used for interpretation purposes. If you deprive these pre-contractual documents of any legal effect after signing the final contract, you are making an entire contract or a four corners agreement which becomes the sole operative document between parties and you can draft it like this :

"This contract is intended to contain the whole of the parties agreement and is not supplemented by a collateral agreement either oral or in writing, and pre-contractual documents do not form part hereof".

General terms, clauses or conditions relating to certain types of transactions should be examined by the drafter in advance to decide if they are to be incorporated in the new contract or amendments should be brought.

If pre-contractual documents are annexed to the contract, they have to be reviewed to eliminate any contradiction among them and should be subject to a term in the contract giving each of them the degree of preponderance in case of contradiction. If this is not defined, courts or arbitrators may classify them pursuant to their relevance to the contract or according to the technicality and sophistication of each document.

Pre-contractual documents tending to create obligations, like heads of agreements, should be dated or numbered for each version for easy reference and because the latter shall cancel the former or amend it.

Letters of intent:

Letters of intent may be used for several purposes:

1. to prove that the intention of parties coincided to conclude the contract subject to authorities approvals;
2. to define some commitments, such as secrecy and settlement of disputes;
3. to negotiate certain points;
4. to give suggestions relating to the subject matter to the other party;
5. to state some warranties or conditions precedent;
6. to state the commitment to continue negotiations with good faith or that there is no liability in case negotiations are severed.

The party sending a letter of intent or required to sign and return such letter prepared by the other party, should consult his drafter to avoid being responsible in an early state before defining his rights against the other party.

The drafter when reviewing such letter may put conditions precedent, state that signing this letter is not final and is subject to contract; mitigate the responsibility of his client; negate the existence of any offer to that effect in the current stage of negotiations; or consider the whole matter of contracting suspended on signing a final written agreement, etc....

The law applicable to the letter of intent should be known.

Letters of intent may engender obligations in cases such as the promise to contract, the preliminary offer to contract, agreements in principle, and in contracts with conditions precedent.

Comfort letters:

In the case of Kleinwort Benson Case in 1989 in England, the Malaysian Government wished to operate in London tin markets and its wholly owned company formed a wholly owned English company (a shell company) and gave Klein a comfort letter in consideration of banking facilities saying: "It is our policy to ensure that the business of our subsidiary is at all times in a position to meet its liabilities to you". Tin market collapsed and the English court said that: "The evidence did not show that the words were intended to be a promise as to the future conduct of the defendant". This is enough warning to give attention to comfort letters.

Feasibility studies:

These studies may be made by the buyer or on its behalf. They should not be made by a prospective party because of the probable conflict of interest. However in some highly specialised fields it may be necessary for studies to be conducted by a potential contractor, and in such case such contractor may merely be engaged to supervise performance by other firms, or to supply designs or to be a consulting engineer.

Contracting approach:

Contracting may commence by entering into a single contract with a single party or a group, or dividing the obligations among several parties entering in an individual contract with each party, such as BOT contracts. There may be a single contractor for all works specially in turn key contracts or product in hand contract approach. Price may be lower if several contractors are engaged than a single one, in such case either the purchaser contracts with the group or with one who subcontracts with others.

The group may be integrated into an independent body or may not, and the contract should deal with the issue of responsibilities and liabilities undertaken by the group and whether each member is responsible "for all obligations (joint and several)" . Co-ordination of the scope and time of performance under each contract should be made to achieve targets planned and a consulting engineer may be engaged for that purpose.

Another approach is to take one of the contractors to assume responsibility for co-ordination or for some part of it. Purchaser may make a joint venture with the other parties, and this may be subject to mandatory rules of applicable law.

Selection of the other party and conclusion of the contract:

There are two approaches in this point: inviting tenders or negotiating with firms selected by purchaser without

former procedure. Tendering may be open or limited, i.e., restricted to pre-qualified projects.

Legal rights and obligations of parties engaging in tendering procedures may be regulated by mandatory rules of the applicable law or by the rules of a lending institution financing a project.

Under open tendering system the invitation is communicated by means of an advertisement which may be circulated internationally or more restrictedly.

Under limited tendering system the invitation to tender is sent individually to selected projects accompanied by a full set of documents to be provided to prospective tenderers, and which include usually instructions to tenderers conveying information with respect to the preparation, contents, submission and evaluation of tenders and model forms of documents to be submitted with the tender. The instructions may include the criteria which tenders must meet to be successful. The purchaser may prepare the contractual terms that are to form the basis of the contract and supply them to tenderers. Purchaser may require tenderers to submit a tender guarantee meeting specific criteria (unconditional - with a certain minimum percentage, etc.).

Tenders are opened in the presence of tenderers or their representatives, in public or in closed session in exceptional circumstances. They are compared and evaluated to choose one. They may be all rejected. You may be invited to participate in choosing to make sure the

offer is compatible with the terms and conditions of the tender.

In certain circumstances purchaser may be able to combine the tendering and negotiation approaches.

Divisions and sub-divisions:

You have, first of all to follow a methodology in drafting by making chapters or sections with headings, and giving serial numbers for the contract as a whole and not for each chapter. Such numbers are put in several ways: (See: Bradgate: p.101- 103).

a. The decimal numbering system: may by used as follows:

"1. Obligations of the seller
  1.1. Delivery of goods
    1.1.1. time of delivery
    1.1.2. place of delivery
  1.2. Delivery of documents
    1.2.1. kinds of documents
    1.2.2. description of each document
  1.3. Conformity of goods
"2. Obligations of the buyer
  2.1. ...etc.

b. The separate bracketed numbers, such as:
1.
 1(1)
  1(1)(I) or 1(1)(a)

1(1)(ii) or 1(1)(b)
1.(2) etc.

There may be other systems for use also.

Headings:

Headings are usually used for the sake of clarity and may not have any legal intended effect. This can be stated in the contract by saying: " The headings used in this contract may not modify, limit or expand in any way the scope or extent of terms"; or you may say: " Headings do not form part of the contract and are used only for clarity without bearing any legal effect".

On the contrary, headings may be put to have legal effect, although this is rare, and if this is the choice of parties you have to put a provision to the contrary of the above.

Hereinafter and the like:

Some writers (Robert Bradgate) are of the opinion that words such as: "aforesaid, hereinafter, whereof, whensoever, the same" are not in general use and can generally be avoided. He gives an example: "A hereinafter referred to as the buyer" could be: "A referred to in this contract as the buyer". However, the spread of such words is well noted.

Date and parties to the contract:

Identity of parties includes: name, place of incorporation, address of headquarters or registered office. The date of the contract and its parties may be stated at the outset as follows:

"This contract is made this Seventh day of November 1999 in London, UK
"By and between:
"1. X Company, a joint stock company organised and existing under the laws of England and having its registered offices in London, hereinafter referred to as the seller; on the one part
"And
"2. Y Company, an Egyptian limited liability company organised and existing under the laws of Egypt, and its registered offices in Egypt also, hereinafter referred to as the buyer, on the other part".

You may add with each party an indication about the person representing it or you can leave it to a special clause in the contract.

Preamble:

It may also be called : recitals or witnesseth or whereas clause, and it contains description of the parties, the subject matter of contract, its purpose and brief statement of agreement of parties, such as:

"Whereas X company has good experience in manufacturing gearboxes of the types envisaged by the buyer Y company. Whereas X company met with Y company and could fully understand its requirements and expressed its readiness to provide them. Whereas the two parties agreed upon making this sales contract upon the terms and conditions hereinafter appearing".

Here is another example for recitals in the sale of gearboxes:

"Whereas seller designs and manufactures in England, industrial equipment and devices, stated in seller's catalogues, and
"Whereas buyer wishes to purchase gearboxes, type (M2000) for its factory in Cairo, Egypt, in accordance with the specifications indicated in schedule A to this contract, which is an integral part hereof, both parties has agreed upon the following terms and conditions, in addition to the general conditions the seller submitted to the buyer and they are annexed to this contract in schedule B; which is also an integral part of this contract."

Definitions:

In many cases you may put some definitions for key terms and expressions at the beginning of the contract usually after the preamble. You may not be aware of all definitions required when you start drafting, but you collect them by keeping a list beside you, and where you find an expression which repeats in the same meaning

more than once or twice you insert it in this list and give it the meaning you or your client intend if it has the same meaning in every time you use it and you avoid in this way any repetition.

Once the contract is drafted, a check must be carried out to ascertain that there are no differences in the several uses of the term.

Where the expression is used in a different meaning in some clauses, express this different meaning in the place of such use. After drafting the contract, turn to this list to put it in alphabetical order and to begin each expression with a capital letter, then introduce them saying: "The following expressions are defined as follows, unless otherwise stated in this contract".

Definitions may be made by referring to a set of rules such as Incoterms 1990.

Here are some examples for definitions in the sale of computers:

"-Computer: includes all machines, machine elements, features, model conversions and accessories, unless the contract shows that reference is made to an individual machine or machine element. Computer also includes computers on order but not yet installed as provided herein, and computers which are installed under a lease or rental agreement between seller and buyer.
"- Features: include additions and removals.

"- Model conversions: include upgrades, down grades and conversions to another type.
"- Programs: means such computer programs as seller may make generally available to buyer without separate charge for computers of the types ordered by buyer under this contract."

As you note, definitions here are alphabetically stated, they are explained sometimes by the word "means" or by the word "include" and we have explained the difference between the two words before.

Rules for interpretation:

In some contracts, drafters add, after definitions, some rules to be used to construe the contract. Here are some of them:

1. The effect of this contract depends on the intention of parties, which is assessed objectively and derived from the words of contract and not from the intention of one party only.
2. The singular includes the plural and vice-versa.
3. The masculine includes the feminine and vice-versa.
4. "Person" means natural or juristic persons.
5. Obligations of parties enure (or do not enure) to successors and assigns.
6. Reference to statutes include (or do not include) re-enactment or modification.
7. In case of contradiction between clauses written in the contract and schedules, the former has precedence unless otherwise stated in the contract. In case of

contradiction between schedules *inter se* they take priority in numbered sequence unless otherwise provided for.

8. Where two or more persons are obliged with the same obligation(s) their obligation(s) is/are joint and several unless otherwise stated in the contract.
9. "Years" mean calendar year. Week means seven days commencing at 00.01 hours on a Sunday" (or as may be chosen).
10. "Week end" means Saturday and Sunday" (or as otherwise defined".
11. The words "and/or" means that the concerned party may exercise any of the alternative rights alone or in any combination.

Drafting stringent clauses:

Where the drafter makes stringent clauses, and the client tolerates them in practice, the competent court in case of dispute may consider your client having waived such clauses.

To avoid such result, it may be stipulated in the contract that : "In case of any right resulting from this contract which is not used or involved by the party concerned, this may not be considered as waiver or expiry of such right". The contrary may be required by the parties and you have to draft it as they wish.

Description of the effect of a clause:

A party may describe the effect of a clause, and in case of dispute, the court may consider such description as

limitative and enforce the clause within the limits described, unless the drafter says in his description that such description: ".. is as illustration and is not limitative". For instance, the landlord stipulates that tenant shall not be allowed to bring animals, for example cats or dogs, into the flat. Bringing in a loud parrot is outside the "class" defined by the landlord, and he cannot complain unless he adds ".. without prejudice to the generality of this article" (See: Bradgate).

Less stringent terms:

If resistance to terms is expected from the other party, a less stringent list of terms may be prepared and submitted one by one only in case resistance from the other party occurs. In such case a final review of the contract must be thoroughly made. The danger inherent in such conduct is that the existence of hidden terms means that the declared ones are unreasonable. But this does not affect the contract because the declared terms are in this way gradually waived.

Time:

Terms requiring something to be done within a period of time should consider the consequences of failure to comply with.

Periods of time running from a certain date means that that date is excluded. The term "without delay" is different from "immediately", the latter is faster.

It is said that references to the hour of the day in England are to Greenwich Mean Time (GMT), except during summer time when they are references to British Summer Time (BST).

Severability of terms:

In international contracts, parties endeavour to save the contract as much as possible and to exclude avoidance of the contract as a whole because great damage may result for both parties. For this reason parties often agree upon the severability of terms or clauses. This enables them to consider each complete sentence or provision separate from other sentences or provisions. Nullity or avoidance relating to one provision will not affect the rest of the contract.

Representations and warranties:

One of the parties may induce the other to contract by stating some information about its establishment or its products. The other party may rely upon these representations believing that they are true. If afterwards they prove to be untrue, he can sue the other party for "misrepresentation".

This is why such party is advised when receiving a form to sign, to consult his legal adviser to discover fraud and misrepresentation. If nothing was discovered, such party can sue the other when misrepresentation is discovered. In a case before the English courts, a German company supplying machines to a customer in England who does

not know German at all (and this fact was known to the representatives of the seller) has sent two forms of terms in English to the buyer who signed one and returned it keeping the other with him. Having been in dispute later, the buyer knew that the copy sent to the seller was backed by terms in German, one of which confers jurisdiction to German courts. The buyer did not consult his lawyer, but this is not a fault which affect its situation in the case, and the court of appeal held that the jurisdiction clause was not binding on the buyer and he was entitled to assume the similarity of the two copies.

The authority to contract must be stated, i.e. the capacity of a commercial company to enter the contract (non ultra virus), and the capacity of the person representing such company to sign on its behalf. The company represents and warrants its correct name, legal address, the trading address and they should be mentioned, as well as the country of registration. The authority must be scrutinised by the drafter of the other party, and ceilings of the power to sign must be certain. The law of incorporation of each party (not the governing law of the contract) is considered the applicable law for these purposes. Notarised or legalised papers may be enough. Exhibits should be signed by parties, because they contain documents referred to in the contract but not bound up within it, such as technical specifications, geographical areas, price calculation and the like. If schedules are prepared by technicians they must, nevertheless, be perused by the drafter.

Companies stating a post office box without any other address raise doubts about its sincerity and reality.

As a drafter, do not rely on implied terms in the law applicable to the contract, but state them in the contract specifically.

A representation may be made in the form of a verbal collateral promise, such as the manager of a bank who wants to calm the borrower and to incite him to sign a form of strict clauses by saying: "don't worry, we never sue on this". Such representation is better to be put in writing even in a separate paper.

Standard terms overleaf:

Standard terms may be printed on the reverse of some documents such as an order, delivery note or acknowledgement of receipt, and in such case the recto of the document should contain a reference to the verso stating that: " this document is subject to terms shown overleaf".

If standard terms are varied from time to time, or rubber stamps are used on the documents for this purpose, such stamps must be legible, if not it will not form a part of the document. It is preferable to draw the attention of the other party to the changes or updating saying that: "We accept to send you the goods, pursuant to our standard form actually in force, and a copy of which is attached hereto".

Unusual conditions:

Onerous or unusual conditions should be fairly brought to the attention of the other party. The drafter can discover whether a condition is onerous or unusual by comparing it with other conditions in rival businesses.

Course of dealing:

Sometimes the parties rely on "the course of dealings" in their transactions. This expression was construed in a case in England to be dealing enough if the parties had done business together for three or four times per month for three years during which contracts were made orally and sellers used to send a "sold note" containing their terms to the buyer (See: Bradgate 134-136).

The said three or four times a month may occur in local transactions, but in international transactions I expect that three or four times a year are enough to form the course of dealing.

We shall begin to define the drafting of the rights and duties of parties.

Delivery:

Delivery is the most important obligation of the seller. It relates usually to the handing over of goods; but it may also relate to something else, such as the delivery of the documents of title of the goods especially where they are shipped.

The drafter of an international sales contract should not rely on local provisions of law and should draft appropriate provisions, such as:

1. Place of delivery:

which may be at seller's or buyer's place of business, or at any other place agreed upon. Where there are several places for each party, in which place shall delivery be effected? Is delivery effective or assumed? The drafter may use Incoterms of the ICC and in this case he has to see if the duties and rights explained therein are agreeable for his client.

2. Time for delivery:
The drafter has to define the time of delivery at the point of delivery. He may add that time of delivery is of essence, that is to say it is meaningful for the buyer as he does not approve to take up the goods in any other time and delay gives him the right to repudiate and terminate contract.

3. Notice that goods are ready for delivery:
The drafter of the buyer has to provide for seller's duty to serve a notice upon the buyer informing him that the goods are ready for delivery, and to provide for the case of failure to serve such notice.

Governmental authorisations:

The contract may provide for the seller's obligation to: "assist the buyer in obtaining any required export licences". The seller may add: "The obligation of buyer to pay the price is not waived by the delay or failure to secure or renew licence or by cancellation of any required export or import licences".

The buyer may disapprove such term for lack of fairness and may ask that the seller has to take necessary procedure for export from his country and bears the risks of failure to do, and that the procedure for import licences is the responsibility of buyer.

4. Who pays for delivery:

Usually the seller pays for delivery and the buyer pays for receipt. But this is not mandatory, as parties may convene otherwise, by charging one party with all costs or allotting them on equal shares.

5. Who has to insure for goods:

The drafter has to care for this point. Sometimes this can be known from the name of a certain type of sale such as CIF or FOB.

6. Who bears the risks:

The drafter has to define the point in which the liability for risks passes to the buyer. As legislations are

divergent on the point, the drafter has to adopt a criterion which may be, in the light of the interest of his client, the time on which title of the goods passes to the buyer (criterion serving the interest of seller), or the time on which handing over of goods is effected (criterion equitable for both parties), or the time of putting the goods in the warehouses of the buyer (criterion serving the sake of the buyer).

7. Quantities to be delivered:

Quantities delivered should be exactly as the contract defines. But sometimes parties agree that: "Quantities shall be subject to increase or decrease of five percent". Such difference has to be tolerated and the difference shall be noted in the price pursuant to contract rate, and a stipulation indicating this provision may be included in the contract.

The contract may provide that: "All measurements shall follow the metric system", but an English seller may like to provide for English measurements.

Partial delivery:

The drafter should care for partial delivery : is it allowed or not ? How many instalments are allowed ? What would be the quantity of each ?

The contract may be severable or entire. In case of a severable contract, the breach of condition to one instalment does not affect the other instalments. In an

entire contract such breach to one instalment is a breach of the whole contract allowing termination. The drafter may express his client's choice in a provision to be inserted in the contract.

Liabilities of seller as to delivery:

There are implied terms in English law either imposed by statute or by common law, for certain types of contracts. Seller's implied liabilities are:

1. Goods sold by description or by sample should correspond to the description or to the sample, and if both are stipulated they must correspond to both.
2. Goods supplied should be of satisfactory quality and fit for buyer's purpose. Elements of satisfaction may be: appearance and finish, freedom from minor defects, safety and durability, etc. Goods must attain the standard which a reasonable buyer would regard as satisfactory.
3. Seller should have a right to sell the goods as a principal, or be a representative of the person having such right.
4. Goods should be free from undisclosed encumbrances, and the buyer must enjoy quiet possession.

These points can be subject to a clause or condition in an international contract, and such clause should safeguard the interests of both parties. For instance, the seller may draft the terms of delivery as follows:

"The seller will give the buyer notice when the goods are ready for collection. The buyer will then take delivery of the goods within ten days of the service of that notice [reasonable time], and time for performance of the buyer's obligation to take delivery shall be of the essence. If the buyer fails to take delivery in accordance with the provisions of this clause, the following provisions shall apply:

"1. Buyer will bear the risk of any loss or damage to the goods after expiry of the time for their collection [this happens where such risks are to the side of seller until delivery, but if such risks has already passed to buyer there may be no need for such term].

"2. Seller may make such arrangements as it thinks fit for the storage of the goods until they are collected, but shall not owe the buyer any duty of care in making those arrangements and shall not be liable to the buyer for any loss or damage or deterioration of the goods caused by their storage.

"3. Buyer will reimburse seller all costs and charges incurred by the seller in connection with the storage of the goods.

"4. Seller may immediately, or at any time after expiry of the time for collection of the goods, treat the contract as repudiated by the buyer's breach and make such arrangements as it thinks fit for the disposal of goods.

"5. Buyer will in any case be liable, and compensate seller for any losses and costs incurred by seller as a result of the buyer's breach or the termination of the contract" [buyer's obligations treated as conditions].

Buyer may safeguard its interest by negotiating some points such as:

a. Stipulating that he bears no liability if such notice of taking delivery is not received by him.

b. Stipulating liquidated damages as a sole sum to be paid whatever seller's losses may be, etc.

Mitigating liabilities for delivery:

The drafter for the seller may wish to exclude some of these liabilities or mitigate them. For instance, he may mention that the sample is just for illustration. He may use a blanket exclusion to avoid such implied terms, together with an express warranty offering the buyer limited rights to repair or replacement at the seller's option, but excluding or limiting any right to damages and excluding the right to reject. If you are drafting for the buyer you have to resist such clauses and negotiate for others.

It was held in England that the seller had effectively excluded all implied terms when he put this clause:

"This agreement contains all the terms under which I agree to purchase the machine specified above, and any

express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded". As you see, it is a very dangerous clause for the interests of the other party: the purchaser.

The drafter for the seller may exclude other liabilities stating that: " This contract contains all terms agreed upon. No statements made outside this contract in brochures, catalogues, sales literature correspondence or orally during negotiations are intended to have contractual effect."

The drafter for the buyer may reject this wording or may try to mitigate its effect by adding at its end:

"Except in case of a collateral contract concluded with the end user", as in such case the buyer can protect himself from the claims of his customers by referring them to the manufacturer as a result of the collateral contract based on the pretensions made by the seller in his literature and upon which the end user has relied.

If such mitigation of the exclusion was not acceptable to the seller, the drafter of the buyer may advise to arrange for an insurance to cover his liabilities towards the end user, and to arrange for a deduction of price equal to insurance premiums, and in this way buyer can avoid losses.

The drafter for the buyer should care to make a provision that the resale to one of his customers may not be considered acceptance of goods.

Remedies:

If the seller accepts liability for contractual undertakings, he may wish to limit the remedies which may be claimed by the buyer, or limit liability for breach. On the other hand, the buyer may seek to reinforce such remedies, which the drafter has to individualise and discuss as follows:

-stipulating a right to reduction of price;
-stipulating a right to reject the goods or part thereof including any or all of the goods not affected by the breach;
-claiming for damages and refund of the whole price or pro rata;
-stipulating a right to repair or to replacement;
- terminating the contract, etc..

The drafter should care for imposing time limits for remedies, although time limits are a dilemma, because non observance of any of these limits may be construed as a waiver of such remedy.

The right to reject a part of goods forming one unit is generally not acceptable unless this part is detachable and can be replaced, otherwise rejection should concern the whole unit.

Non-rejection clauses:

Such clauses are common in international sale contracts, as rejection causes problems for the seller. The drafter of the buyer should resist clauses of non rejection, specially in cases of non conformity to the sample and/or to specifications.

A compromise for the interest of both parties may be the inspection of goods by a superintendent company appointed by the buyer at the port of shipment and drafting a clause that the report of such company shall be considered acceptance by the buyer.

Time limit for rejection:

This time limit may be defined by the contract. In English law this time limit runs from the time of delivery, but it can be stipulated to run from any other time, and the drafter for the buyer should care to stipulate enough time for his client, and may require the seller to collect the goods and to bear costs of transport, with allocation of risks on his side.

Assignment:

The seller may seek to be discharged from performance by assigning the contract to another seller and may say: "Seller reserves the right to assign this contract in whole or in part". Buyer may resist such term, and may reach an agreement to make such assignment subject to its prior written consent.

Failure to pass the inspection:

The contract may state this phrase: "subject to survey or inspection". This term is open to various interpretations:

1. it may mean that there is no contract; or
2. it may mean that although there is no contract, the parties are not free to withdraw; or
3. it may mean that contract exists but may lapse if the condition is not fulfilled.

The drafter should determine:

- What is required by survey, inspection or test?
- Who performs it?
- What is the time allowed?
- What are the consequences of failure to effect it, or failure to pass the test or inspection?

Non contractual liability of seller:

In common law despite the fact that contractual liability may vanish by limitation, tortuous liability may exist, and this is also practicable under French law and its family laws.

Sellers in Europe are advised by their drafters not to guarantee the commercial value and possibilities of an invention and not to undertake to perform strict quality control. Buyers (often existing in third world countries) have to insist upon the opposite or to seek stronger obligations of sellers.

For instance, disclaimer of liability is advised by drafters of suppliers to be taken from a licensee as follows:

"The licensee recognises the possibilities resulting from the use of the know-how by the licenser prior to the conclusion of this contract. The licensee recognises the value and that the development of such know-how would require significant investment which this contract allows it to avoid. The licensee also, due to its experience in the relevant area covered by the know-how for the past ... years, is capable of assimilating and adapting the know-how to its needs and to take charge of the results which it wishes to obtain" (See: Study Group, op. cit.).

Such clause should be refused by an importer of technology because it dispenses supplier from any liability, it is a black clause; and a fairer clause should be negotiated.

Waiver:

Each party may reserve for its interest by saying:

" The failure of either party to enforce at any time any of the provisions of this purchase contract or to require at any time performance by the other party of any of such provisions, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this purchase contract, or any part thereof or the right of either party thereafter to enforce each and every provision".

Executory and executed contracts:

The English law distinguishes executory contracts from executed contracts. The example of an executory contract is the contract implemented by instalments agreed upon to be presented from both parties. The seller presents an instalment and the buyer, as consideration, pays its price. Parties are free in such contract to stop performance at any time and terminate or amend the contract.

In the executed contract, where one party had executed all its obligations while the other did not yet execute, termination or amendment is not available for lack of consideration. But if the agreement upon termination contained consideration, for example in the form of future instalments with interest, termination becomes valid, and it is considered "accord and satisfaction". Parties may require their contract to be one of these two types.

Specific performance:

In civil law countries, contracts must, generally, be implemented, and in case of failure to implement, specific performance shall be ordered and the claim for damages may not be honoured except where the specific performance is impossible or hurts the personal liberty of the debtor, and this is the case with every obligation of "*intuitu personae*" character, or which is onerous for the debtor.

On the contrary, specific performance, in common law countries, is rarely ordered for the implementation of a

commercial contract even if it is an international contract, because the basic remedy in case of breach is awarding damages instead of specific performance even if such performance is possible.

Specific performance may not be granted except in cases where the court decides that pecuniary damages are not the equitable sanction for non performance. This idea developed in the English courts and specific performance became possible where it will do more perfect and complete justice than an award of damages.

In accordance with the Act of Sale of 1893 (article 52) which was reproduced in the new Act of Sale of 1979 as article 52 also, the court may, if it thinks fit, and upon request from claimant, order specific performance, and deprive defendant from the choice to retain goods and pay damages. This provision is exceptional and applies for sales the subject matter of which is an identified thing. English courts do not use too much this power and limit it to cases where the applicant for specific performance attaches special importance upon specific performance (Falke v. Gray). Courts refused to grant specific performance where the matter relates to commodities existing in markets (Cohen v. Roche), or where the subject matter of obligation is a service or work to be effected by the seller, or where specific performance is onerous for the debtor, or where specific performance affects the equilibrium which should prevail between the positions of contracting parties in the eyes of equity (want of mutuality) (Price v. Stronge 1978), or where specific performance required constant supervision of the

court, which is not possible to do (unsuitability) (Ryan v. Mutual Tontine); but this does not apply to turn key contracts which require constant supervision from the court (H. Giles v. Morris 1972).

The UN Convention on International Sale of Goods provided in article 28 for a moderate solution saying that:

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".

The drafter of the buyer should care for any delay and may say:
"If delivery of goods is delayed by more than ten days for causes not deemed excusable, buyer shall have the right to:

1. defer payment of seller's relevant invoice a period equal to the time of delivery delay without waiving buyer's right of deducting any applicable cash discount and deducting interest for the said period.
2. deduct from seller's relevant invoice an amount of 0.1 percent per day from the 11th to the 20th day of delay, and of 0.3 percent per day from the 21st day of delay".

The drafter of the seller may argue in order to put a ceiling asking to add : ".. so that the deduction shall not exceed an amount of 10% of the price of the goods".

The drafter can provide for a clause "performance versus performance" to be able to invoke the principle of "*exceptio non adimpleti contractus*".

If the drafter is anxious about performance, he has to make specific performance a condition of the contract, in order to avoid awarding damages in lieu of specific performance in case of dispute, unless his principal prefers otherwise. He may also stipulate that specific performance is of the essence of the contract.

Specific performance stipulated in the contract may be delayed because of a mobilisation period clause which allows a period (one or two months) between the payment of a down payment and beginning performance.

Damages:

Damages may be claimed by either party to the contract of sale. Its extension is linked to the negotiating skills of such party and to its economic weight.

Damages claimed may relate to properties or to persons; may be material or immaterial, may be loss of reputation or goodwill, loss of future orders or business, lost profits or indemnity against buyer's liability to its customers or sub-contractors. An indemnity clause made by the buyer may say:
"The seller shall keep the buyer indemnified against any action, liability, cost or expense arising or incurred for reasons such as:

1. Any injury to any person, or loss or damage to any property caused or contributed to by any of the following events or similar events:
   i. negligence of seller, and/or his employees;
   ii. faulty design of the goods or the use of faulty, defective or substandard materials or workmanship;
   iii. any defect in goods.
2. Any claim from a third party that the goods, their use or packing, infringe the intellectual property rights of that third party or his principals".

The clause "no damage for delay" may not dispense the concerned party if it was guilty of fraud or wilful misconduct.

Extensive damages may be claimed if the concerned party put a contract term saying that a series of downstream obligations were contracted by it with others relying upon the specific performance of the obligations of the debtor who will pay damages for all of them in case of default.

In some cases, damages are confined to the difference between contract price and market price if there is a provision to that effect in the contract and an available market for such goods.

The seller may, instead of an exoneration clause for delivery, provide for a clause of mitigated liability or for a power of seller to vary the date of delivery or for a sliding scale.

The drafter of seller may provide for damages by limiting them to the refund of price paid or by excluding some heads of damages. The drafter for the buyer should be cautious for that.

Liquidated damages:

The drafter may put a liquidated damages clause, which means that the need to prove actual loss is eliminated and liability therefor is liquidated in a certain sum of money, even if the loss was less than such sum. However, such clause has to provide whether liquidated damages are the only sums to be paid or they will be considered on account, that is to say supplementary sums may be claimed later. The concerned party may provide that liquidated damages are fixed without possibility of being increased or decreased for any reason.

Liquidated damages in English law are not a penalty, because the judge cannot amend them, while a penalty can be amended or dismissed by the judge. Penalties are sometimes turned to another form by making the amount required a consideration to a right to be exercised by the party who will pay the amount.

Liquidated damages are not the same as an overall limitation of damages, which means that that limitation is the highest end of the sum to be paid and losses has to be proved.

The contract have certain advantages, because the expenses and uncertainty associated with the proof of

losses are removed. Many legal systems have rules, which are sometimes mandatory, regarding liquidated damages clauses and penalty clauses. Under some legal systems, only clauses under which the agreed sum serves as compensation are valid. Under other legal systems, clauses under which the agreed sum serves as compensation, or is intended to stimulate performance, or has both those functions, are valid. The parties may wish to provide that if the failure to perform is caused by an exempting impediment, the agreed sum is not due.

The law applicable to the contract often regulates the relationship between recovery of the agreed sum and enforcement of the performance obligation.

It is in the interest of both parties to delimit clearly the failure to perform upon which the agreed sum is payable. In quantifying the agreed sum, if the applicable law so permits, the purchaser may find it beneficial to provide for an agreed sum in an amount which both provides reasonable compensation to the purchaser and puts a moderate pressure on the contractor to perform. Excessive sums should be avoided, under many legal systems, those sums would be set aside or reduced. The agreed sum to be paid is often fixed by way of increments, and a limit may be placed on the amount to which the increments can escalate.

In order to facilitate recovery of the agreed sum the contract may authorise the purchaser to deduct the agreed sum from funds of the seller in the hands of the purchaser. The contract may also provide for a guarantee to be given

by a financial institution in respect of the agreed sum. The parties may wish to include in the contract a new performance date, and provide that delay is measured by reference to the new date.

Temporary and definite impossibility of performance:

UN economic sanctions against Iraq are temporary, but after two years of embargo an arbitrator in Milan Chamber of National and International Arbitration awarded on the 20th of July 1992 that the lapse of two years, forbidden activities towards Iraq must "be considered definitive, taking into account that the circumstances are fundamentally changed, that it is still impossible to foresee if and when full normalisation shall be reached in the relationship with the Iraqi State and that it shall be necessary, if normalisation shall be reached in the near or far future, to renegotiate all contracts".

Clauses of exclusion or exoneration for negligence:

The clause made by the seller of cars to exonerate himself from liability saying that :"all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded"; was not enough to exonerate that seller from liability for a contract of selling a new car which was revealed to be a second hand car, because this is a breach of an express term, and, also, there is an implied condition (not term) that the goods should comply with their description.

To have exoneration against negligence, drafters prefer to use the word negligence itself, or a synonym covering its meaning clearly. The statement that: "the company is not responsible for damage caused by fire"; was not enough to exonerate that company from fire caused by negligence (See: Bradgate, op.cit).

A drafter may stipulate an exoneration from "any loss whatsoever". This wording relates to types of loss, while "negligence" relates to the manner in which loss occurred, and to cover the manner he should say: "any loss, however caused", and thus negligence is included.

Exclusion clauses should not be in small print or in a complicated language.

Seller may put warnings and limited use in the contract or in his literature, and may distinguish appropriate use and special uses from improper use. In such case these warnings may alleviate its liability.

If the drafter puts a term to protect his client against liability for "any damage, howsoever caused", and that client is asked by a customer about the contents of this clause and the client answers stating one or two reasons of damage and does not tell that the protection term relates to "howsoever" cause, the protection term shall not protect this client against liability for causes other than those stated by him because he made a "misrepresentation". He ought to consult his drafter before giving such answer.

An exoneration clause should be set before the other party before the conclusion of the contract. Here is an example: Claimants (before an English court) registered as guests with the receptionist of the defendant hotel. When they mounted to the room they found a notice of exemption from loss or theft of property from rooms. Some furs were stolen and it was held that the hotel could not rely on the said notice because the contract was concluded at the reception and the notice was ineffective because it was declared too late.

The drafter may put a term to protect his client from any acceptance made by the employees of that client to clauses and conditions submitted by the other party, saying that:

"No employee or agent of (the first party for instance) can vary the terms and conditions in this form (or contract)".

Besides the contractual liability of seller for performance, his tortuous liability such as tortuous duty of care and negligence can be established whether in common law or in civil law countries, and the buyer's drafter may put a provision to this effect which should not be confined to a general exclusion of liability as it is likely in such case to be construed to mean the strict contractual liability, therefore the buyer's drafter has to use for this purpose the term "negligence liability". Seller's drafter on the other hand may wish to exclude such liability, but such exclusion may be considered in English law to be unreasonable.

The seller may exclude its liability except for fraud or wilful misconduct, such clause may be drafted as follows:

"Except for fraud or wilful misconduct from the part of the seller, neither seller nor its suppliers will be liable to the buyer, whether in contract, in tort, under any warranty, for any special, indirect, incidental or consequential loss or revenues or the loss or use thereof, cost of purchased or replacement power, or claims of customers of the buyer".

The seller may say also:

"Remedies stated herein are exclusive and the total cumulative liability of seller under this contract or any amendment made thereto, or any act or omission in connection therewith or related thereto, whether in contract, in tort, under any warranty, or otherwise, will be limited to the price of the item of equipment on which such liability is based. The provisions of this article, and of all other sections of the purchase contract providing for limitation of liability of seller shall also protect its suppliers and shall apply to the full extent permitted by law, regardless of fault and notwithstanding any other provisions of this contract, and shall survive any termination or expiration of this contract".

Warranties in English law:

Each of the seller and the buyer may have his own opinion about warranties. The seller may stipulate:

"This warranty defines the seller's liability in respect of the goods. Except as expressly stated in the contract all other conditions, warranties or other undertakings concerned with the condition or quality of the goods, their fitness for any purpose or correspondence with any description or sample, whether express or implied by statute, common law, custom, usage or otherwise are excluded from this contract".

Sometimes the customer prefers to have an indemnity instead of a warranty. To facilitate the application of a warranty you can define goods without defects.

A warranty guarantees the goods fit for customer's purpose, gives the right to repair or replacement or guarantees the durability of goods or that the goods comply to a certain standard, such as:

"The seller warrants that the goods comply with all British and EC statutory and other legal requirements applicable to such goods".

The drafter should indicate the remedies the customer has under the warranty. For instance the buyer may require the seller to warrant:

"The seller guarantees the goods and all components used in them against any defects in design, workmanship, construction or materials for a period of eighteen months from the date of delivery. If any defect manifests itself during that period, the seller will at its own expense repair or replace the goods or component. Repaired or replaced

items under this guarantee are guaranteed for further eighteen months from the date of repair or replacement on the same terms as those applied to the goods originally supplied. In case such repair or replacement does not satisfy the needs of buyer, buyer shall have the right to reject goods".

Here is another example of warranties:

"1. Seller's warranty of goods shall persist for twelve months from the date of provisional acceptance. Seller warrants during the said period to carry out at its expense and in the shortest possible time, all repairs and modifications for the purpose of maintaining the specifications guaranteed to buyer. Any new parts installed to replace a defective one shall be subject to new contractual warranty period from the date of entry into service.

"2. If the seller does not comply with the provisions of paragraph 1 of this article, the buyer reserves the right to have these obligations fulfilled by a third party at the expense and liability of seller.

"3. Expenses resulting from normal wear and tear of goods during the period of warranty shall be borne by the buyer".

Frustration:

Frustration is a common law concept which means an event unforeseen by parties and which renders performance of the contract fundamentally different, such as: promulgation of a legislation affecting the

performance, outbreak of hostilities, perishment of goods without fault, death of a party, destruction of a thing necessary for performance. Pleading frustration mostly is not successful, for instance:

1. if the sources of supply to the seller were cut off, the contract is not frustrated.
2. if the seller could not obtain an export licence the contract is not frustrated.
3. Suez Canal being closed is not a frustration.

The use of the notion of frustration is not common in international contracts.

Force majeure:

The use of this term, although it is of French origin, is common in international contracts drafted in English, but it does not have a common meaning and you may give it a definition from your client's point of view. However we can state some of the events classified as force majeure events: war, strikes, freight embargoes, storms, acts of God, equipment break down, riots, civil commotion, lock out, fire, flood, earthquakes, drought, go slow. But the following events may not be agreeable for a force majeure clause: football matches, increased expenses, a funeral, shortage of funds.

Good drafters prefer to put a definition for force majeure followed by examples for illustration, such as:

"Force majeure means any event outside seller's control, including, but not limited to the following ....".

If the drafter puts in the said examples events inside the control of his client, courts may consider it as an exclusion clause in which case an English judge may use the "Blue pencil test" i.e. he does not amend or rewrite but excludes the exclusion clause.

There may be a battle between the drafters of buyer and seller, the former tries to limit and restrict the scope of the force majeure clause, while the latter tries to enlarge it and widen its consequences to mitigate the liability of his client.

The drafter of the seller may say that the consequences of force majeure are not restricted to performance being legally or physically impossible, but applies also to delayed, hindered or uneconomic performance, and accordingly provide that the time of delivery extends in case of delay or hindrance and that the seller is excused in case of uneconomic performance.

The drafter of the buyer, on the other hand, may try to restrict the cases of force majeure, such as the break down of a machine and may put a condition precedent, that there must be regular maintenance for the machines, or that the seller must serve a notice upon the buyer about the events happening stating that they constitute force majeure. Failure to serve such notice deprives seller from invoking force majeure and renders it liable for damages.

Among the consequences which drafters may state: the discharge or termination of the contract. In such case the

drafter has to define the rights of parties after discharge, for instance:

- Sums paid to the seller, should they be refunded to buyer?
- Expenses incurred by the seller are they repayable to it? or
- Will losses lie where they fall that is to say neither party will take or pay?
- In case of several buyers, can the seller allocate the existing goods among them in pro rata or as he deems fit i.e. in line with his commercial interest? Pro rata allocation seems reasonable and fair than the other method, and makes the clause balanced.

Force majeure may be defined in a manner as to comprise hardships.

On the other hand, the drafter of the buyer may try to insert a clause that "the seller shall use the best endeavours to overcome the events of force majeure. The term "best endeavours" is different from: "reasonable commercial endeavours". In the latter the seller may be relieved from performance if it is unreasonable such as becoming onerous, expensive or exorbitant.

The events of force majeure may be temporary, and the drafter of the buyer can provide that: "as soon as the event of force majeure is stopped the seller shall immediately make the required delivery".

The consequences of force majeure may be drafted from the buyer's viewpoint as follows:

"Seller shall not be held responsible for any delay or failure in performance hereunder caused by acts of God or other causes beyond Seller's control and without seller's fault or negligence. If such contingency occurs, buyer may elect to:

1. terminate this contract or any part hereof as to goods not delivered;
2. suspend this contract in whole or in part for the duration of the delay;
3. buy elsewhere goods and deduct from any commitment the quantities purchased elsewhere;
4. resume performance hereunder once the delaying cause ceases with an option to extend the time for performance hereunder up to the length of time the contingency endured".

Elements of force majeure should be defined as to:

1. who is the party to benefit therefrom?
2. does it relate to : prevention, hindrance, delay or hardship?
3. what is the extent of the burden discharged?
4. what are the types of events (specific or general)?
5. what is the time limit for the duty to serve notice of the force majeure?
6. what are the effects of the relief (termination, delay, apportionment of loss?

Drafters should note the following:

1. The term saying: ".. or any other causes beyond our control" is not restricted to events "*eiusdem generis*".
2. The term "usual force majeure clauses to apply" was held void for uncertainty.
3. Burden of proof is on party relying on a force majeure term.
4. Party seeking relief of liability if prevented must show that performance has become physically or legally impossible and not merely more difficult or unprofitable.

Transfer of title:

Title of goods in general passes at the time of signing the contract if goods are identified things, but if they are determined by kind title passes at the time of individualising goods, unless otherwise agreed.

Transfer of title to the buyer may contradict with third parties intellectual property rights, such as trademarks or patents. Usually the seller prefers to deal with the case of a third party by itself and do not leave it to the buyer, and in such case the drafter may provide that:

"If third parties contest any intellectual property rights, the buyer shall:

1. notify the seller as soon as possible of the objections;
2. let seller direct any legal proceedings at seller's expense and exercise the rights of defence;

3. abstain from making any admission of liability or any compromise with third parties unless seller approves it in writing and in advance".

Retention of title:

In civil law countries reservation of title is easier than common law countries.

Retention of title means that the property of goods supplied under the contract shall not pass to the buyer unless a condition is fulfilled, this condition may be the payment of the price or other sums due to the seller. Such conditional sale may be provided for as follows:

"Goods shall remain the seller's property until the buyer pays the price in full according to this contract"(simple clause).

Even if the buyer is going to resell or to consume goods before paying the price, the contract is still conditional, and seller may provide for a right for itself on the proceeds (proceeds clause); or on the products (products clause). English courts consider that these clauses are disjunctive, specially when a provision is met to the effect that: "each part of the clause is to be interpreted separately from the rest of the clause".

If the buyer became insolvent a liquidator or trustee in bankruptcy may argue that goods were resold or consumed in producing new commodities or that there are no identified goods to which the clause applies.

A simple clause in a contract of yarn sale, retaining title to the seller was brought before an English court. The clause said: "The ownership of the material shall remain with the seller which reserves the right to dispose of the material until payment in full for all the material has been received by it in accordance with the terms of this contract or until such time as the buyer sells the material to its customers by way of bona fide sale at full market value.

"If such payment is overdue in whole or in part, the seller may (without prejudice to any of its other rights) recover or resell the material or any of it and may enter upon the buyer's premises by its servants or agents for that purpose.

"Such payment shall become due immediately upon the commencement of any act or proceeding in which the buyer's solvency is involved.

"If any of the material is incorporated or is used as material for other goods before such payment, the property in the whole of such goods shall be and remain with the seller until such payment has been made, or the other goods have been sold as aforesaid, and all the seller's right hereunder in the material shall extend to those other goods". Such simple clause is effective only where the seller is able to identify the goods he owns, but where they are mixed, problems may arise unless a trademark is fixed, or unless seller stipulates that goods should be separately stored and that buyer acts as a bailee. Seller may stipulate also that the goods are under the risk of the buyer from the time of delivery, and may add insurance. Proceeds of insurance against loss or

damage may be stipulated to be kept by the buyer as trustee for the seller.

Seller may stipulate also that:

"Buyer's right to possession of the goods shall cease if:
1. the buyer has not paid for the goods in full by the expiry of any credit period allowed by this contract; or
2. a receiver, liquidator or administrator is appointed in respect of buyer's business.

"On cessation of the buyer's right to possession of the goods in accordance with this clause the buyer shall at his own expense make the goods available to the seller and allow the seller to repossess them.

"The buyer hereby grants the seller, his agents and employees an irrevocable licence to enter any premises where the goods are stored in order to repossess them or inspect them at any time".

The House of Lords considered the following clause as sufficient to prevent property from passing to the buyer:

"All goods delivered by us remain our property...until all debts owed to us including any balances [current account clause] existing at relevant times - due to us on any legal ground - are settled. This holds good if payments are made for the purpose of settlement of specially designated claims. Debts owed to companies, being members of our combine, are deemed to be such debts".

The seller may seek to have right on the proceeds of sale by the buyer, and the drafter has to make the buyer a

bailee and recast the agreements as undisclosed agency, charging him to hold proceeds in a separate bank account in the seller's name and providing for a commission to be paid to the buyer equal to the difference between sums due to the seller and the resale price of the goods.

Where the contract is for the sale of unascertained goods reservation of ownership may be imposed by the terms of the unconditional appropriation; as to specific goods property passes when the contract is made, provided the contract is not conditional.

Proceeds and products clauses are subject to some doubts in English law and the drafter of the seller may add terms allowing seller to claim for the price, despite the retention of property.

In a FOB sale, the drafter of seller may provide for risk saying that: "All consignments are made FOB, port of shipment as defined in Incoterms 1990 or any replacing edition thereof; and title to goods shall pass to buyer upon delivery to the carrier. Claims for short or damaged goods must be made directly to carrier by the buyer".

The drafter of the buyer may insist to hold seller liable until an evidence to the contrary is shown.

Buyer may charge seller to arrange for transport and insurance in a FOB sale as follows:

"Seller, as agent for the buyer, shall arrange for shipment and procure for the benefit of the buyer full insurance

cover. All expenses incurred by seller due to shipment, including insurance, transportation, stowage, forwarding and other charges shall be borne by buyer and shall be payable upon submission of seller's invoices (or through the documentary credit). The seller shall choose transport means and ways including place of storage, arrange marine and war risk insurance and services of freight forwarders. The marine insurance shall cover standard warehouse to warehouse clause coverage".

Seller may reserve a right to consider the contract as a lease of hire purchase and may retain title of the goods in such case.

Obligations of the buyer:

Payment of price:

Three main methods of pricing are in common use: the lump sum; cost reimbursable and unit price.

Lump sum purchaser is obligated to pay a certain amount which remains constant unless it is adjusted or revised, even though the costs turn out to be different from those anticipated at the time of the conclusion of the contract.

Under the cost reimbursable method, purchaser is obligated to pay all reasonable costs incurred by the supplier together with an agreed fee. Purchaser bears the risk of an increase in the costs over those anticipated at the time of the conclusion of the contract. This risk may be limited by agreeing upon a ceiling on the total amount

or reimbursable costs or a target cost. An incentive to economy and speed of completion of construction may be created by a target fee.

Under the Unit price method parties agree on a rate for a unit and the price is determined by the total units actually used. The risk of cost increases which occur because the actual quantity of units exceeds the quantity estimated at the time of conclusion of contract is borne by purchaser, while the risk of increases in the cost of each unit is borne by the supplier. If the purchaser is interested in completion earlier than envisaged in the contract, bonus payments may be agreed in the contract. The contract may deal with exchange rate fluctuations. Parties may provide for the price to be adjusted or revised in specific situations such as varying construction, incorrect data supplied by purchaser, supplier encounters unforeseeable natural obstacles, the case of changes in local regulations and conditions, etc.

Specified percentages of the price to be paid at different stages may be stipulated as well as modalities of payment and place of payment. Advance payment may be limited to the portion of the price reasonably needed to cover supplier's expenses and to protect him against loss in case of termination. A certain percentage may be payable after acceptance with the remainder payable after expiration of the guarantee period (Uncitral guidelines).

Index clauses:

Index clauses are meant to revise contract price in accordance with changes in the costs of supply by linking the contract sum price to the levels of the prices of certain goods or services prevailing on a certain date. A change in the agreed indices automatically affects a change in the price without the necessity of examining the actual prices paid by the supplier. Some countries restrict or disallow index clauses.

In drafting an index clause it is advisable to use an algebraic formula to determine how changes in the specified indices are to be reflected in price. Several indices, with different weightings given to each index may be used in combination in the formula in order to reflect the proportion of different cost elements (materials or services) to the total cost. Different indices may be needed when the sources of the same cost element are in different countries.

An index clause may include a certain percentage of the price (commonly 5-20%) which is not subject to any revision under the clause. This percentage is intended to make allowance for the fact that some items may be paid for by the supplier at a lower price level than that reflected in the price index for those items. It may also afford some protection against other inaccuracies resulting from the formula used in the index clause. In addition, if the aim of the index clause is to protect the contractor only against higher costs of performance and not against

inflation in general. This percentage may reflect the supplier's profit.

The indices should be readily available (published at regular intervals, reliable). Indices published by recognised bodies or intergovernmental agencies may be selected.

In cases where it is desired to provide an index for labour costs, a consumer price index or cost of living index is sometimes used if there is no wage index available (See Uncitral guidelines).

Currency clause:

Currency clause means that price to be paid is linked to an exchange rate between the price currency and a certain other currency referred to as reference currency determined at the time of entering into the contract. If this rate of exchange has changed at the time of payment, the price to be paid is increased or reduced in such a way that the amount of the price in terms of the reference currency remains unchanged. For purposes of comparing exchange rates, it may be desirable to adopt the time of actual payment, rather than the time when the payment falls due, but sometimes the clause may give supplier a choice between the exchange rate, prevailing at the time when payment falls due or that prevailing at the time of actual payment. It is advisable to specify an exchange rate prevailing at a particular place.

Reference currency must be stable. The contract may determine an arithmetic average of the exchange rates between the price currency and several other specified currencies, and provide for revision of the price in accordance with changes in this average.

Unit of account clause:

The price here is denominated in a unit of account composed of cumulative proportions of a number of selected currencies. The unit of account may be one defined in an international treaty or by an international organisation, and which will specify the selected currencies making up the unit and the relative weighting given to each currency. In contrast to a currency clause, in which several currencies are used, the weighting given to each selected currency of which the unit of account is composed is usually not the same, and greater weight is given to currencies generally used in international trade.

The main advantage of using a unit of account as the currency unit with which the price currency is to be compared is that a unit of account is relatively stable, since the weakness of one currency is usually balanced by the strength of another.

We, as legal advisers, may not be able to make the bases of calculation of prices and accountants or financial experts (solely or with engineers) may be able to do. We have to ask those persons to testify that the formulae they made do not contradict with any of the provisions of the contract.

The SDR (Special Drawing Right) of IMF (International Monetary Fund) might be used as unit of account. Parties may also refer to the European Currency unit as a unit of account. The values of these units are published daily.

Payment within specified time after expiration of guarantee period:

To protect buyer against consequences of defective supply, the contract might provide that a certain percentage of price is payable within a specified time after the expiration of guarantee period. In fixing that percentage, parties may wish to take into account the other securities available to buyer in case of discovery of defects during the guarantee period.

If the buyer is sufficiently protected by a performance guarantee or maintenance guarantee, the contract might provide that the entire price is to be paid within a specified period after the date of acceptance of goods.

Contract might provide that if any defects are discovered and notified within the guarantee period, buyer is entitled to retain from the portion of the price then outstanding an amount to compensate him for the defects. Retention might last until supplier cures defects and pays any damages to which buyer may be entitled.

Credit granted by supplier or by his country:

In most cases, construction of a works is financed by a loan granted to the buyer by a financing institution. Sometimes the credit is granted by the supplier in respect of a portion of the price to be paid in instalments within a specified period of time after take over or acceptance of works by the buyer. Where supplier grants a credit, a credit, issued like security for repayment, interest payable (which are dealt with in a loan agreement within a financing institution) must be settled between buyer and supplier. Construction of works is sometimes supplied by supplier's country to buyer's country, and parties have to take into consideration the provisions of the agreement between the governments of the two countries and the rules which may be issued in the buyer's country in connection with the implementation of the agreement.

How is price paid:

The drafter of the seller has to explain : how is price fixed, and may say:

1. a sum certain;
2. according to seller's current rate of charge;
3. by mutual agreement;
4. by a third party;
5. by reference to some formulae;
6. contains or does not contain taxes, vat, duties or costs of licences, permits, insurance and delivery expenses or are they extra.

If supplier wants to have a right to vary the price, it may make a contract of requirements where deliveries will be made over a period of time, and reference is made to seller's valid lists of prices at the dates of delivery. It is better to serve a notice to the buyer at the time of each change.

Variations may be restricted by the drafter of the buyer to some areas as follows: "Price increases will be limited by the variation of the national material and labour indexes. The applicable escalation formulae established by the seller are stated in schedule c of this contract".

The seller may make the time of payment a matter of essence of the contract.

Method of payment:

There is a general rule that price is to be paid at the premises of the seller unless otherwise agreed.

Payments by cheque is conditional, and if it is not honoured seller can sue under the contract of sale or under the cheque. Postal remittance may be authorised and the risk of loss or delay in the post falls on the seller unless seller stipulates otherwise saying that: "Price is deemed not to have been paid until the seller is in receipt of cleared funds", or "Until the amount of payment is credited to seller's bank account". Such terms are applicable to payment by credit cards as well.

The buyer may enlarge methods of payments by adding set off claims under other contracts or for unliquidated amounts or contingent debts.

The seller may seek to exclude buyer's right to make deductions or to withhold payment for any alleged defects in `performance such as: "Buyer will pay the price in full without any discount (other than a discount allowed by these terms), deduction, set-off or abatement".

Payment may occur through a letter of credit, and in this case the drafter of the seller may provide that:

"Payment shall be made in US Dollars against a confirmed irrevocable letter of credit to be opened by the buyer in favour of the seller within thirty days of signing the present contract. The form and contents of the L/C shall be satisfactory to seller in all respects and all expenses incurred in connection with the opening and operation of the L/C as well as any other bank charges incurred in making payment to seller, shall be borne by the buyer and a stipulation to that effect shall be stated in the L/C. The contract shall become effective only as of the date of issuance of the L/C opened at the latest one month from the date of this contract" (condition precedent). Buyer may ask that documentary credit opening expenses are to his part and that confirmation of such credit shall be borne by the seller.

Instalments, deposits and pre-payments:

Payment may be by instalments and the drafter of the seller should care for the guarantees for settlement such as: letters of guarantee, bank drafts, letter of credit, etc. Seller may stipulate a right to terminate the contract and the matter requires to provide for payments previously made.

The drafter for the seller may make payment of each instalment a matter "of the essence" and buyer's failure gives seller right to withhold further deliveries and/or terminate contract and claim damages for lost profits.

The elements to be defined in connection with the price are:

1. what is price (contents)? If this is not defined before signing the contract, buyer will look for further reductions.
2. when and where is it payable?
3. how payable?
4. what are the securities for payment?
5. when does the risk passes?
6. has seller reserved title until payment or taken mortgage, bank guarantee, documentary credit, etc.?

Here are some details about these points:

What is price? Is it fixed, variable, price geared to schedule of rates, to be negotiated; does it contain expenses, royalty price, target price. Where seller gets

extortionate profits, the Vienna Convention on International sale of Goods considers him dealing in bad faith and gives the buyer right to be protected if it was applicable to such sale. An auditing to the books of seller can be allowed. World Bank finances for third world countries purchases if price is fair.

It should be noted that in English law, if the buyer pays on instalments and the goods perish between the making of the contract and the passing of risk from seller to buyer avoidance of the contract takes place and partial payments are refunded because of absence of consideration. But if such payments are considered a deposit, the seller can retain them. This is why the drafter for the buyer has to care for such deposits and exclude them.

The seller usually prefers to claim for the contract price, in case it is not paid, or any part thereof, rather than claiming for damages for the following reasons to which the drafter for the seller usually sticks:

1. Price claim is a claim for a liquidated sum, and there is no requirement to prove loss or to mitigate damages.
2. Price claim is not subject to the rules of remoteness.
3. Once a summary judgment or a default judgment is rendered, such judgment can be implemented immediately, while the judgment on damages is not enforceable until damages are assessed.

Seller cannot continue performance despite buyer's breach relying on the rule: "go ahead with performance and then claim the price", because this rule in English law

is limited in application and much criticism is directed to it. It is contrary to the *exceptio non adimpleti contractus*. In case of FOB sale, if the buyer did not appoint the vessel, title to the goods does not pass to it (unless the goods pass the vessel's rail) and the price will not become due and the seller can only claim damages unless he makes a stipulation to the contrary in the contract.

Warranty of prices:

The buyer may require the seller to attest that:
"Price charged for the goods purchases hereunder are equivalent to prices charged by similar industries".

Documentary credit as means of payment:

In practice a letter of credit (L/C), must define if a transport document is or is not acceptable, usually it is accepted if goods were shipped and unacceptable if they were received for shipment. Shipment by containers is always received. The credit must stipulate that freight is to be prepaid, buy it may upon customer's instructions accept freight collection. Bills of lading must be clean i.e. do not bear any clause or notation which expressly declares a defective condition of the goods and/or packaging of them. It defines if transport documents are negotiable or non negotiable.

How is price paid?

There may be clauses to define which currency shall be used for payment, and may provide for protection against

fluctuations by futures. Formalities and consents of transfer may be provided for. Payment may be made in cash, draft, telephonic transfer, bill of exchange, cheque, swap, barter, L/C. etc.

It often occurs that while the seller retains a letter of credit to secure payment of price, the buyer retains a letter of guarantee or a stand-by letter of credit submitted by the seller to guarantee the performance made by the seller. Such guarantee should be a first demand guarantee; on the other hand, bonds do not suffice to safeguard the interest of buyer.

There are some countries which have a track record for unfair calling **of** guarantees, but sellers deal with them because they put the risk built into the profit margin, and this may be completed with an insurance.

Appropriation of payments:

If a debtor owes several debts to a creditor the general rule is that the debtor is entitled to appropriate payments to any of the debts and the creditor is bound by such appropriation unless otherwise agreed. If the debtor fails to make any appropriation the creditor may appropriate payments. If there is a current account the rule "first in, first out" applies.

These provisions in English law are not too different from civil law countries, for instance in the Egyptian civil code and similar codes articles 344 and 345 provide:

"Article 344: If a debtor owes the same creditor several debts of the same kind and if the payment made by him does not suffice to cover all the debts, he has the right to appropriate, when effecting payment, the debt which he intends to discharge, provided that he is not prevented from so doing by law or by agreement".

Article 345: "failing any appropriation by the debtor as provided for in the preceding article, payment shall be appropriated to the debt that has fallen due; in a case where several debts have fallen due, to the most onerous debt, and in a case where the debts are all equally onerous, to the debt appropriated by the creditor".

The drafter for the creditor, then, should care to the appropriation in case of instalments and/or of several debts, saying that:

"Seller may appropriate any payment made by the buyer and apply it in total or partial satisfaction of any debt then due from the buyer to the seller. Where the amount paid by the buyer is less than the amount due to the seller under the contract to which it is appropriated, the seller may appropriate the payment to any individual goods or item supplied under that contract".

Buyer's obligation to take delivery:

The provisions of acceptance and taking delivery of goods are briefed by Robert Bradgate as follows: (p.218-219)

"Buyer's basic duty is to accept the goods. This is not necessarily the same thing as taking delivery of the goods. The buyer may take delivery and then reject the goods; alternatively, the buyer may fail to take delivery at the proper time without repudiating the contract. A buyer who rejects the goods fails to accept them. Buyer is entitled to reject if the seller is guilty of "breach of condition". The right to reject is lost if the buyer has already accepted goods. A buyer who rejects where either there is no breach of condition, or the right to reject has been lost, itself commits a breach of contract for which the seller can claim damages, mostly being the difference between contract price and market price at the date when they should have been accepted. Seller's remedy is a claim for damages assessed in accordance with the rules generally applicable. Thus, seller is obliged to take reasonable steps to mitigate loss, and damages are not recoverable for losses which are too remote. Damages may include a reasonable charge for the care and custody of the goods".

Buyer's obligation of co-operation:

Buyer must co-operate with seller to enable him to perform his obligation, such as providing or approving plans or specifications, installing plant or machines which need access to buyer's site, obtaining licences in his own country. There may be a time limit for each of these tasks in the contract.

Fundamental breach from either party:

There is a difference between: "breach of fundamental term" and "fundamental breach" : the former means breach of something which underlines the whole contract so that, if it is not complied with, the performance becomes something totally different from which the contract contemplates, such as the case of a seller who sends tea instead of coffee. The fundamental breach, on the other hand means making serious consequences to the innocent party, such as the installation of defective machinery which resulted in a fire that destroyed the premises of the other party. The differences between the two terms is that the innocent party may affirm the contract after a fundamental breach, but there is no possibility of affirmation of a breach of fundamental term amounting to a total non performance and such affirmation relates to a new contract" (see Bradgate: op.cit).

But if the seller reserved a right to himself to vary his obligations (by changing specifications or quantities for instance) there may not be any breach unless the contract is considered a contract of adhesion.

Service of notice:

An agent may be appointed by either party to receive notices addressed to such party, and in this case a letter may be sent to the agent (domicile elu in French) to get its approval as follows:

"In the contract of Y and Z copy of which is attached, you have been nominated, by article ... as agent on behalf of Y to accept service of process. Kindly sign and return back the enclosed copy of this letter stating that you irrevocably and unconditionally accept being nominated agent for Y".

The contract should provide for means of communicating acceptable between parties by saying : "fax, telex and E Mail acceptable", and other means can be excluded by saying: "notice by other means shall be unacceptable".

The time a notice produces its effects should be pointed out by saying for instance: "Notices required hereby shall be served as follows:

1. if sent by courier, it shall be effective two days after dispatch.
2. if sent by fax or telex, it shall produce effect upon transmission."

Termination for cause:

The contract may provide for cause of termination such as: bankruptcy, liquidation, appointment of a receiver, substantial change of ownership or management structure of either party.

Choice of law and allocation of jurisdiction:

The law applicable to the contract may affect the contract in different ways: for example, that law may contain rules on the interpretation of contracts and may contain

presumptions as to the meaning of certain words or phrases. It may also contain mandatory rules regulating the form or validity of contracts which it is advisable to take into account in drawing up the contract. In certain circumstances, the applicable law may contain non mandatory rules regulating the contract in regard to certain issues, for instance, in regard to the quality of the goods and services to be supplied. One approach is for the applicable law to be determined at a very early stage of the relationship between the parties. Thus, where tendering procedures are adopted the applicable law may be stipulated in the invitation to tender, or where those procedures are not adopted, that law may be agreed to at the commencement of negotiations. Another approach if for the parties to determine the applicable law only after negotiations have taken place of the main technical and commercial issues and have resulted in a measure of agreement between the parties.

Usually the parties make the choice of law and of jurisdiction in their contract. Each party may find it easier to choose its home country; but negotiation skills may lead to a better choice, for instance one of the laws and courts of:

1. the country with which the contract is most closely connected;
2. the country of the central administration of the party effecting performance, or its principal place of business;
3. the place of contracting; or
4. the place of a sold immovable.

It is said also that the choice of jurisdiction usually follows the choice of law; but a different choice, however, may be made.

Jurisdiction may be chosen before courts of several countries. A contract may also be subject to several laws from different points of view, for instance: there may be a law for the substance; another for the form; a third for the capacity of parties; a fourth for the procedure, a fifth for the arbitration clause, etc.

Jurisdiction in international contracts is often given to arbitration, whether institutional or ad hoc.

Drafting of an arbitration clause or agreement:

To draft an arbitration clause or agreement you have to follow these steps:

1. You have to gather all necessary information, such as:
   a. will the arbitration be ad hoc or institutional;
   b. will arbitration comprise all disputes that may arise between parties, or be limited to a certain dispute or disputes;
   c. will the arbitration award be final or appealable;
   d. what would be the number of arbitrators;
   e. how are arbitrators appointed;
   f. what is the law applicable to the procedure and to substance;
   g. what is the language of arbitration;
   h. where is the seat of arbitration;

i. will arbitrators act as "***amiable compositeurs***";
j. what other matters the parties may like to add?
k. what about the challenge of an arbitrator?
l. the possibility of making partial awards;
m. the possibility of admitting other parties or of permitting them to attend as observers;
n. means of evidence;
o. witnesses;
p. appointing experts;
q. multi party arbitration;
r. conservatory measures;
s. the case where the tribunal becomes trancated;
t. the waiver of sovereignty. Etc.

Then you go to drafting.

2. The distinction between ad hoc and institutional arbitration is essential, because it points out whether the parties will direct the arbitration by themselves or by an arbitration centre. If an arbitration centre is required such centre must be stated in the arbitration clause or agreement and much care should be directed to state the exact name of such centre. The ICC says that most arbitration clauses state wrongly the name of the ICC. But as there is one ICC in the world, the ICC disregards this error and accepts such cases subject to the final opinion of the arbitrators who will give the award on such case. It must be noted, also, that some arbitration centres accept ad hoc arbitration to be conducted in their premises, such as Cairo Regional Centre.

It is very important to be careful not to convert an institutional arbitration into an ad hoc arbitration. In one case claimant lost his case because the defendant refused to renew the period of rendering the award. Details were as follows:
In an ICC case (No.3383 as Mr. Stephen Bond states in an article) arbitration began as institutional, but parties decided to shift to ad hoc arbitration using the same arbitral tribunal and drafted a compromis fixing three months to give the award. This term was extended four times but defendant then challenged its legality under its national law and refused to extend. The arbitral tribunal declared its mandate had expired. When claimant returned to the ICC the sole arbitrator held that the compromis had suspended the original ICC clause and it is no longer a valid arbitration clause.

While stating a certain centre of arbitration and referring to its rules you have to state if the version of rules intended is that existing at the time of drafting or any amended version that may exist at the time of initiating arbitration procedure.

3. You have to define if the arbitration you are providing for is an international or a local arbitration. Local arbitration needs a review of the local **mandatory** rules of procedure which will apply to see if they are satisfactory to your client. Where such local rules are not known to you, you have to ask for assistance from a law firm in the concerned country.

4. The scope of arbitration and whether it comprises all disputes is of primordial importance. If you say: "disputes relating to the interpretation of the contract", the scope of arbitration is very narrow, as it will be limited to the differences of interpreting or construing the contract and will not include those relating to performance or to the validity of the contract. But if you say: "all disputes (or any dispute) arising out of this contract or relating to it", then the arbitration will contain any dispute of whatever nature. If you are providing for a certain dispute and the award was nullified, a new arbitration using the previous arbitration clause will not be possible unless the defendant agree, because the previous clause ended. If your client is not clear enough to choose, you can advise him that a wide choice is better in order to avoid dissipation of jurisdiction by giving the arbitrator a bit and leaving the rest to state courts.

5. It is necessary to provide for the finality or non finality of the award. If the waiver of appeal of the award can be validly made in advance in accordance with the law applicable to the procedure, then the arbitration clause providing for the finality of the award can be drafted easily, but if such anticipated waiver is not practicable in the said law, the arbitration clause providing for finality cannot resist such mandatory rule of procedure and each arbitration clause will not prevent a prospective appeal. Finality of awards is one of the major advantages of arbitration because it saves time and money, but you can seek the best for your client's sake, is it to make the award final or appealable.

6. The number of arbitrators may be stated in the arbitration clause or agreement. Most national laws and arbitration centres make the arbitrators of an odd number, i.e.: 1, 3, 5; but in English law the dual arbitration panel is well known, and in case of a tie an umpire is invited to settle the case. A sole arbitrator is suitable for cases of minor value and cases where the sole arbitrator enjoys the confidence of the two parties, otherwise three arbitrators may be nominated. It is rare to use the services of five or more arbitrators.

A panel of three arbitrators is expensive and time consuming, but (as Stephen Bond says) parties from developing countries and Eastern Europe who have disputes with western parties prefer three arbitrators believing that their chosen arbitrator will be able to explain to his colleagues the legal, economic and business circumstances in which they operate. Usually the chairman is chosen of a third nationality, and also the sole arbitrator.

7. How are arbitrators nominated? Arbitrators are nominated by parties. They agree upon the sole arbitrator. If three arbitrators are required each party nominates one arbitrator, and the two arbitrators nominate the third arbitrator who usually presides the arbitral tribunal. Parties, however, may delegate the appointment of arbitrators or of the president of the arbitral tribunal to the court or to an appointing authority, such as: The Secretary General of the an Arbitration Centre, or the President of the Permanent

International Court of Arbitration of the Hague, or even to an ordinary person agreed upon by the parties. If the appointed arbitrator dies, a new arbitrator is to be appointed by the same appointing authority. The way of nominating arbitrators may be stated in the arbitration clause or agreement.

In Cairo Regional Centre for International Commercial Arbitration, where the Centre is requested to appoint a president of an arbitral tribunal, the Centre invites the parties to participate in the process of choice, by giving each party a copy of a list of, say, ten names of arbitrators. Each party separately shall delete the names he wishes to delete and they put the rest of the list in the order they want using numbers: 1, 2, 3. The Centre collects the two lists and seeks the appropriate matching on a certain name who is considered the appointed president by consent parties together with the Centre.

8. The law applicable to procedure and to substance: the arbitration clause or agreement may contain the choice of parties as to the law applicable to procedure, and it is often the law of the place of arbitration. Such choice may not impede parties from elaborating a procedure for their case provided that they respect the mandatory rules of the applicable law specially the rules which prescribe the essential guarantees of litigation.

Parties may also agree upon the law applicable to the substance of the case. The choice of such laws in the arbitration clause or agreement is useful for the appointment of arbitrators at the time dispute arises

because at that time we need to choose arbitrators who should be specialised in the applicable law. Non choice of the applicable law will increase the time and cost of arbitration and may bring in unsuitable arbitrators.

9. The language of arbitration may be agreed upon in the arbitration clause or agreement, and may not. If not agreed upon, the language of the contract may be considered as an indicator. However, another language or languages may be allowed by the arbitral tribunal. The arbitration clause or agreement may also provide for translation to be introduced by the interested party and give the other party the right to contest such translation or provide for the authenticity of translations.

If the applicable law was not chosen at the time of drafting, the arbitrator may give a decision forming an unpleasant surprise to one party or the other.

In few cases arbitrators are authorised to award in accordance with equity, ***ex aequo et bono*** or with arbitrator acting as mediator. Sometimes parties say that settlement shall be "on the basis of international law". The drafter must have a clear idea about the law chosen in regard to the specific contract he makes. The drafter may often exclude the application of conflict of law rules in the chosen law and stipulate that it applies as a substantive law, if this is the intention of the parties or is more convenient to them.

The drafter must ascertain that the chosen law considers the subject matter of the contract arbitrable, such as IP disputes which are not arbitrable in some jurisdictions and must be settled by national courts (S. Bond in his said article about the arbitration clause).

10. The seat of arbitration is very important and its choice may be an indicator to gain or lose the case. In one case (stated by Stephen Bond) relating to royalties not paid and cancellation of the agreement was claimed by one party from Finland against another party from Australia before the ICC, the seat of arbitration was London by the choice of parties, and English law was applicable to the procedure. The arbitrator applied the provisions of limitation in the English law, which considers limitation an issue of procedure not of substance. The period of limitation in English law is six years. The six years had already passed and the arbitrator dismissed almost all the claims. It is evident here that the choice of the seat of arbitration was the reason for losing such rights.

11. Parties may allow the arbitrators to give their award in the capacity of ***"amiable compositeurs"***, i.e., without being bound by any law, or the parties may say " arbitrators shall settle ***ex aequo et bono***" as stated before. It should be noted that this is prohibited in the laws of some countries. If this was not stated in the arbitration clause or agreement, it means that arbitrators shall settle the case according to a certain law to be determined by the rules of conflict of laws.

12. If a government is a party to the contract you have to provide for its waiver of immunity and its acceptance to arbitrate.

13. The arbitration clause or agreement may provide for conciliation to be effected by the parties before resorting to arbitration and may make this way of settlement mandatory. This does not mean that the opinion of the conciliator is binding, but that the recourse to conciliation is binding even if it may not lead to an accepted settlement.

14. The arbitration clause or agreement may state that partial awards are, or are not, allowed.

15. While drafting an arbitration clause or agreement, make a revision of all documents, schedules and general conditions of the contract, because it is probable that a clause of litigation before courts may exist and you fall in contradiction. It is not advisable to accumulate different jurisdictions unless there is a good reason for that.

16. It is desirable for the arbitration clause or agreement to obligate the parties to implement arbitral decisions, including decisions ordering interim measures.

17. As to foreign investors it is important to state in the arbitration clause or agreement that the way chosen for arbitration is the sole way and no other arbitration may be resorted to, and 'the right to any other sort of arbitration is hereby waived'. This is the lesson learnt from the case of Giza Pyramids in which the contract provided for an ICC arbitration and this arbitration

ended by avoidance of the award by the French " ***Cour de cassation***" . When the foreign investor initiated a new arbitration with ICSID they gained their case despite the fact that ICSID was not the arbitration agreed upon and no document signed by the parties was submitted in accordance with Article 25 of the Washington Convention.

18. The arbitration clause, despite the fact that it is included in the contract, is considered distinct from such contract and severed therefrom. You can state that in the drafting of the clause, but it is not usual to do, and this principle applies without being stated in the clause. No need, also, to state that the arbitration clause shall survive after avoidance of contract, because this principle is admitted all over the world. But if you state it, this is OK.

19. Some parties, in rare cases, state in the arbitration clause or agreement some rules of procedure to be followed by arbitrators, such as giving each party one month to submit a memo, hearings for pleadings shall be held in camera, witnesses can be examined and cross examined, etc. If you are requested to add such details you can do.

20. Arbitration clause may provide for the nationality of the president of the arbitral tribunal to be other than parties nationalities.

21.In numerous cases parties state in the arbitration clause that arbitration shall be preceded by some means of ADR (alternative dispute resolution) such as mediation or conciliation or mini trial. French jurisprudence has considered such stipulation binding on the parties and arbitration may not begin unless the stated means of ADR has been taken and failed to provide a solution of the

dispute. Parties are bound here in the sense that they have to co-operate to mediate or conciliate, and this is an ***"obligation de resultat"***, and to seek in good faith a solution for their problem, and this is an ***"obligation de moyen"*** . If a party **proceeds** to arbitration without the steps of mediation or conciliation, the other party can plead **non** competence or ask the arbitration centre to keep the case in abeyance until mediation or conciliation ends. Arbitration centres such as the ICC or the GCC, or Cairo Regional Centre can conduct mediation, conciliation and expertise upon request of parties, and there are rules for each. You have to read carefully the set of rules chosen, and remember that they are not binding and you can make a derogation from their provisions in the arbitration clause or agreement.

22. If the agreement of parties to arbitrate is made after the dispute has arisen (a compromis or a submission clause) such agreement usually contains the name of the nominated arbitrators, unless an appointing authority is stated therein.

23. You can provide in the arbitration agreement or clause for the confidentiality as an obligation binding **on** arbitrators and parties as well.

24. Arbitration centres usually adopt a specimen arbitration clause to be inserted in contracts. Such specimen clause is found in the regulations of every centre.

Such model clauses are usually too short and state the essential elements which are: providing for institutional

arbitration before such centre, providing for all disputes or any dispute to be resolved by arbitration and providing for the finality of the award. Other elements stated above are left to the discretion of parties, and you have to consider your client's interest as to each of these elements.

Signatures:

At the end of the contract the signatures of parties appear, and such signatures give legal value to the document. Signatures must be accompanied with stating the names of signatories, their titles, their capacity, for which party are they signing, the place where they sign and the date. Exhibits should be singed by parties or their representatives because they contain documents referred to in the contract but not bound up within it such as technical specifications, geographical locations, price calculations, etc. If schedules are prepared by technicians they must be read by the drafters.

United Nations Convention on Contracts for the International Sale of Goods (signed in Vienna 11.4.1980 and entering into force 1.8.1988)

As we are considering the ways of drafting sales contracts, it is important to seek assistance in our work from the above mentioned Convention. Here are some notes about it:

1. The drafter should know the provisions of this Convention (provided in English and French in the annexes to this book), either to avail his client from them or to include its application. For instance, this Convention makes pre-contractual documents during negotiations a tool of interpretation, and also usages. If the drafter wants to exclude this, he has to exclude articles 8 and 9 of the Convention, or to mention the required provision or to exclude the application of the Convention as a whole.
2. The drafter has, either to avoid applying the Convention on a contract relating to one of the matters upon which the Convention is not applicable (stated in articles 2,3,4,5 and 6), or he may clarify that these articles are deliberately intended to be applied.

3. Where the Convention applies, it will be applicable together with the law applicable to the contract according to article 7.2 of the Convention.

4. According to the Convention, a contract of international sale of goods is not required to be in writing even if it is of significant value (article 11 and 29 of the Convention); unless the applicable law stipulates otherwise and a declaration under article 96 of the Convention is made. But this does not apply to an arbitration clause or agreement which should, almost all over the World, be in writing.

4. The Convention can be excluded from application (article 6). Such exclusion may be total or partial. For instance: if you want to give a notice its effect irrespective of the fact that it was delayed or failed to arrive, you have to exclude article 27 of the Convention which provides for the contrary. If you want to have specific performance, you have to exclude article 28 of the Convention and to seek for an applicable law which do not impede specific performance; English law may not be suitable in this regard, as specific performance there is too limited as we have explained before.

5. The drafter should be careful when applying the Convention to ascertain whether the concerned parties to the Convention has adhered thereto as a whole or to a certain part of it, because the Uncitral left the liberty for contracting parties to make such choice. Information about such matters can be solicited from the Depository of the Convention.

6. Using an Incoterm expression may be construed as considering it as usages binding on the parties.

7. The official Arabic version of the Convention, is not an accurate translation and may not be relied upon solely without consulting a version in another language.
8. According to the Convention (article 11) an international sale of goods contract may be oral (by telephone for example). States where this is not acceptable such as Eastern Europe can make a reservation (according to article 96 as stated before) excluding the application of article 11. However, this exclusion cannot be made by a stipulation to that effect in the contract because article 12 of the Convention prohibits such stipulation and it is regarded as the sole mandatory rule in the Convention. As a result, it is not possible to combine the application of the Convention together with an exclusion to apply article 12, being mandatory. The right thing in such situation is to exclude the application of the Convention as a whole, but this does not prevent you from borrowing some provisions from the Convention without reference to the Convention itself.
9. If you give to the Convention total application to the contract you are drafting, this is fair because the Convention has made an equilibrium between parties; but the other party or his drafter may seek for advantages more than those prescribed by the Convention or seek to throw burdensome duties upon your client. For these reasons you have to :
   a. be **careful** and cautious of that;
   b. make your point of beginning far in the field of the other party, contemplating that negotiations will put your client in the fair position, if not in a more advantageous position. Such advantages are not

always contrary to the principle of good faith stated in the Convention, as this is the nature of the period of negotiations.

11. The drafter should know if there is a background of transactions between his client and the other party, because if there have been problems, he has to tighten the sanctions and to demand more guarantees from that party. Most of the victims in international sale contracts are persons dealing for the first time with a swindler. If your client is negotiating for the first time with the other party keep him informed with this fact, aid him by drafting a good contract and advise him to make ample inquiries.
12. One of the main points of weakness of the Convention (from the viewpoint of developing countries is that articles 71, 72 and 73 relating to the cessation of execution and anticipatory avoidance, are based on using personal criteria in evaluating the fundamental breach which may occur from the other party. Endeavours from the Egyptian team under the chairmanship of Late Dr. Mohsen Shafik at the time of discussion of these articles during the diplomatic conference, produced few amendments which are not enough to restore equilibrium in the positions of parties. For this reason, where you are drafting for a developing country party, you have either to put objective criteria instead of these subjective criteria; or to exclude the application of these three articles.
13. Article 78 of the Convention, permits claims for interest. The Convention did not allow reserves towards these articles, and the Egyptian suggestion for that end was refused. If you are drafting for a

buyer from Saudi Arabia or any other country prohibiting interest, such as Yemen, you have to exclude article 78 of the Convention. What was prohibited at the time of ratifying can be done now at the time of drafting.

14. The Convention does not provide for the '***theorie de l'imprevisibilite***' and do not give a definition for the 'force majeure' or impediment. So, if you find that these two concepts are important for the sake of your client, arrange for their application by a special clause, making the suitable definitions by your hand.

Unidroit Principles:

The "Unidroit" Institute in Rome together with the ICC., could achieve and declare a set of principles, in May 1994, relating to the law of contract. This work is actually under discord between partisans and opponents from different states. The ICC published some of these divergent opinions in its publication No.490/1.

Some writers consider these rules a very important achievement on the international scale. The principles were elaborated in a simple language without using technical and sophisticated terminology used in different legal systems. The principles use a "lingua franca", that is to say a simplified terminology.

You can use these principles if the parties agree upon them. The application of Unidroit principles can be in different ways:

1. Parties to the contract may agree that their contract be governed by them. Unidroit becomes the law of the contract. But this choice may be disapproved by the courts of some countries where a national law is required to govern the contract.

2. Parties to a contract may agree that their contract be governed by general principles of law, by the ***lex mercatoria*** or the like. Unidroit principles may be considered in such case as a sort of codification for such laws. But the drafters of Unidroit themselves do not expect national courts to adopt Unidroit principles during

this stage in which no governmental support has been given to them, but they expect too much reference to these principles in the field of arbitration.

2. If there is a national law applicable to the contract, the principles may provide a solution for such law.
3. Unidroit principles may be used to construe or supplement international uniform law instruments.
4. Unidroit may serve as a model for national and international legislators.

Unidroit principles respect the application of mandatory national and international rules (article 1.4).

As Unidroit principles are limited in number, their application should include the application of underlying general principles of Unidroit (article 1.6).

There are some areas which are not dealt with in the principles of Unidroit, these are: lack of capacity, lack of authority, immorality or illegality (article 3.1); assignment of contract and limitation. Conflict of law rules make such points dealt with through national systems.

Capacity rules may differ in systems adopting citizenship criterion from systems adopting domicile criterion. If the rule of conflict of laws refers to the ***lex contractus***, and Unidroit was chosen to govern the contract, you may be faced with negative conflict of rules. In such case you have to include capacity provisions in your contract.

Immorality and illegality, although they are outside the scope of texts of Unidroit principles, can be considered a

part of international public order, which supplement Unidroit principles to prevent illicit trades.

Unidroit principles are attached hereto. The purpose of putting these principles under your eyes is to be able to use it as a check list and to assist you in drafting a lot of provisions in your contracts keeping in mind the interest of the party whom you represent. As to using Unidroit principles for the purpose of interpretation of laws and contract, I think that few of these principles can serve this purpose, because Unidroit principles are so general and abstract to the extent that they need commentary, interpretation and explanation and for this reason they may not aid as means of interpretation even if accompanied with explanations due to the fact that such explanations will differ in details. This may not degrade Unidroit principles as a very accurate codification of the theory of contract which can be accepted in civil law countries as well as in common law countries; but we are in need for researches to know to what extent Unidroit principles are compatible with Islamic Law.

CHAPTER III
Loan Agreement

The aforementioned drafting rules should be followed and here we are going to see some new clauses or terms.

The date is stated in the agreement at first, then the parties. The borrower may be stated at first and then the lender(s). Where a party has more than one capacity such capacities may be stated together after its name; or the said name may be stated several times and with each time one of the capacities is to be stated, such as the bank which, in a syndicated loan, has capacity as security trustee and facility agent and arranger. Its name may be stated as:

a) X Bank, in its capacity as security trustee;
b) X Bank, in its capacity as facility agent;
c) X Bank, in its capacity as arranger.

Definitions:

When referring to definitions in an article or item, the number of such article or item should be stated twice: once at its beginning and the other within it, such as:

"2. Definitions: In this contract the following terms shall have the meanings stated for each of them in this article ."

This is to avoid meanings drawn from other parts of the contract.

The definitions may include the following or something like the following:

■Available facility: means the total amount put under the disposition of borrower.

■Borrowed money: means money borrowed or raised by the borrower including:

1. debts resulting from any documentary credit, stand by letter of credit or acceptance opened upon instruction from the borrower.
2. debts resulting from securities, bonds, debentures, notes, bills of exchange, and/or similar instruments on which borrower is liable as, issuer, drawer, endorser, acceptor or otherwise.
3. debts resulting from guarantees, bid bonds, performance bonds or otherwise; and/or
4. debts resulting from forward sale or purchase contracts and similar instruments.

■Default rate: means 1.5%, per annum over the cost of funding of the overdue amount.

■Event of default: means all and each of the following events:

1. failure to pay the principal, interest or any other amount due. Failure includes the following cases:

1.1. where borrower admits in writing its inability to pay;

1.2. where borrower applies for or approves the appointment of, or taking possession by, a receiver, administrator, custodian, trustee, liquidator or the like;
1.3.where borrower makes a general assignment for the benefit of, or a composition or arrangement with its creditors;
1.4. where borrower is declared in bankruptcy insolvency, reorganisation, liquidation, winding up or adjustment of debts.

2. Repudiation of contract by the borrower in whole or in part.
3. Expropriation or nationalisation of the assets of borrower.

Facility: means the USDollar term loan facility granted according to the terms and conditions of this contract to the borrower.

Investment grade: means the rating of BBB or more as determined by Standard and Poors Rating Agency.

Lien: means any encumbrance, charge, pledge, mortgage, hypothecation, lien, lease, title retention, trust arrangement, assignment, right of possession or detention of any kind.

Loss: means any damages, loss, cost, expense, charge, fee, payment, claim, demand, liability, interest or penalty.

Repayment date: means each date indicated in schedule No. ... fixing the time of paying an instalment or interest.

Taxes: means any and all present and future tax of personal property, turnover, income, use, customs, value added, stamp, interest equalisation, gross receipts or other taxes, levies imposts, duties, withholdings or other similar charges, together with any penalties, fines or interest thereon imposed, levied, assessed by any government entity.

Interpretation: the following rules and the like may be stated to construe the contract:

- The terms: "agent, security trustee and/or arranger" shall be interpreted to mean and include the said party, its successors, permitted transferees and permitted assigns.

■The term "person" shall be construed to mean any natural or juristic person, company, corporation, incorporation, firm, partnership, association, government, state, agency of a state or an international body.

■- The term 'subsidiary' shall be construed to mean that a company or corporation is controlled directly or indirectly by the first mentioned company or corporation, or more than half its issued capital is beneficially owned, directly or indirectly by the first mentioned company or incorporation.

■The term 'winding up', dissolution' or 'administration' of a company or corporation shall include any equivalent or similar proceedings under the law of the jurisdiction in which such company or corporation is incorporated.

■Headings of terms and conditions as well as schedules are for easy reference solely and do not ensue any legal effect.
■A 'statute' includes any amendments or re-enactment which may occur from time to time (or may not include if so required).

The facility:

Grant: the grant of facility can be provided for as follows:

"The bank(s) grant to the borrower(s) with the terms and conditions hereinafter, a Dinner term loan facility in the aggregate amount of... '.

Purpose: the purpose may be defined in this way:

'The loan is intended to be used in financing the import of equipment for the factory of the borrower and it is a condition precedent that borrower shall apply any and all of the amounts raised hereunder to the satisfaction of the said purpose' .

Joint and several obligations:

The contract has to deal with this point. If, in a syndicated loan, banks wish to have several obligations they may state that:
'The obligations of each bank hereunder are several'. This means that failure by a bank to perform, shall not affect any other bank party to that contract.

If the borrower insists upon the whole amount to be granted, he has to stipulate the joint commitment of banks, in such case he may say:

'Where one of the banks fails to pay its available commitment, its share shall be paid pari passu by the other banks during one month of borrower's notification of failure to such banks'.

Drawdown:

Partial payments to the borrower may be stipulated as follows:

'Unless otherwise stipulated in this contract, the right of borrower to have advances shall be exercised as follows:

1. a notice of drawdown or withdrawal shall be delivered with a period of not less than two days nor more than seven days to be observed before the date of making the required advance.
2. the date of delivering notice or making any advance shall in all cases be a banking day.
3. the amount of such advance should be within the limits and periods provided for in schedule no... hereof.
4. it is a condition precedent to any advance that no event of default may have occurred until the date of making the advance and the borrower shall attest this fact in the notice of drawdown.
5. any sums undrawn at the date of termination of the loan shall be cancelled'.

Interest: payment of interest may be stipulated in the following manner:

'At the end of each interest period of one month borrower shall unconditionally pay the accrued interest, according to the rate of LIBOR on the quotation date at 11.00 a.m. London time plus 2%, irrespective of any set off, counterclaim, defence or other rights which the borrower may have against the bank(s)'

Repayment: it may be as follows:

'Borrower shall repay the amounts borrowed on ten equal instalments, on repayment dates defined in schedule ... hereof. In all events the balance outstanding shall be paid in full on or before maturity date defined in clause no... Borrower shall not repay the whole loan or part thereof except at the times stated in schedule ... hereof'.

Re-borrowing:

'Borrower do not have any right to re-borrow the sums settled under this contract'.

Taxes:

Banks may stipulate that:

'Payments made by borrower under this contract to any of the creditor banks must be made free of tax. If, however, borrower is required to pay subject to deduction or withholding tax, borrower shall increase the amount

payable to ensure that such creditor receives and retains a net amount equal to that it would have received and retained had no such deduction or withholding been made'.

Illegality:

'Where it becomes illegal for the bank(s) to make, fund or permit to remain outstanding the loan of its share of the loan, the bank(s) shall give notice to the borrower, who shall instantly repay the loan or the share required thereof together with the accrued interest'.

Representations:

'The following are the representations and warranties of the borrower in reliance on which the bank(s) accepted this contract:

1. Borrower is a corporation duly organised and lawfully existing under the laws of Bahrain, having the power to execute this contract, to perform all obligations emanating therefrom.
2. This contract and its schedules are the operative documents and constitute when executed the legal, binding and valid obligations of the borrower enforceable in the courts of Bahrain without any further action, filing, or registering.
3. The balance sheets submitted to the bank(s) were prepared in line with accounting principles generally accepted in Bahrain and give the true and fair financial position of borrower in the respective dates and there are no liabilities undisclosed therein.

4. The execution of this contract shall not conflict with any agreement, mortgage, bond binding upon borrower or any of its assets or with any applicable law or regulation.
5. No approvals from any body, giving of notice to any body or registration with any body is required for the execution, performance, validity or enforceability of this contract.
6. Information given by the borrower to the bank(s) in relation to this contract are complete and bona fide, and the borrower did not abstain from disclosing any facts or circumstances which, if disclosed, would affect the decision of the bank(s).
7. Borrower warrants that no encumbrance is existing or intended to be created over any or all of its revenues and or assets whether present or future.
8. Borrower warrants that there is no legal proceedings pending or at its belief threatened against which may affect the business, operations or general affairs of borrower, or for the appointment of a receiver, administrator, trustee or similar officer.
9. Borrower recognises and undertakes to enforce the jurisdiction of the Courts of Bahrain and Bahraini Law as applicable law to any dispute.

Covenants:

The following may be covenants of borrower:

1. Borrower undertakes to submit to the bank(s) its balance-sheet every year within 120 days from the close of each financial year. Borrower shall, also,

submit every semester the financial statements of the previous semester within sixty days from its end. Borrower accepts hereby any access to its books and records by bank(s).

2. Before the disbursement of each drawdown to the borrower, the borrower shall give notice to the bank(s) of any event that may negate any of the representations, warranties and/or covenants stated in this contract or of any event of default occurring until the date of such disbursement.
3. Borrower covenants that its tangible net assets shall not be, at any time, less than US$50 million as proved by the up to date financial statement or balance-sheet. Tangible net assets include any amount credited to the issued share capital, any capital redemption reserve and exclude any sums relating to goodwill, intangible assets or bad debts without provision.
4. Borrower covenants to do its best endeavours to prevent any action that may result in any arrest, seizure, confiscation, taking into execution, impounding, forfeiture, or the like events, of any of the contents of its plant or its products, and in case any such event occurs borrower shall procure to release it instantly'.

Rights of lenders after any event of default:

'After any event of default lenders will give written notice to the borrower to the effect that:

1. The loan or the outstanding balance of it is immediately due and payable on demand, and require payment thereof instantly.
2. The undrawn part of the loan is cancelled.'

General indemnity:

'The borrower covenants hereby to indemnify and hold harmless the bank(s), their managers, officers, employees, agents, and servants from and against any and all losses relating to or arising from the design, manufacture, delivery, import, export, testing, possession, control, use, operating, leasing, sub leasing, maintenance, repair, condition, service, modification, change, alteration, damage, removal, replacement of any part of the plant. These indemnities shall remain in full force and effect despite the completion of all obligations of the borrower in this contract, actual and contingent.

Currency of account and payment:

'The US Dollar is the currency of account and payments. Debit and credit accounts in other currencies may be kept upon request from the borrower, but the final balance of all accounts shall be converted into the said currency at the prevailing rate of the day of settlement. Such settlement shall be made regardless of any set off or counterclaim'.

Commitment fee:

' The borrower shall pay to the bank(s) a commitment fee on available commitments during the period from this contract entering into force until the date of termination hereof. The rate of this fee is 1% per annum and shall be

settled on the dates of settlement provided for in schedule No... '
(Arrangement fee and agency fee may be stipulated in addition).

Costs and expenses:

' The borrower shall, on demand, reimburse the bank(s) against incurred costs and expenses in connection with the preservation and/or enforcement of any of their rights including legal and counsel fees and travel expenses and any VAT due thereupon.

'The borrower shall pay stamp duties, registration fees and other taxes to which this contract, or any judgment rendered in relation thereto, is subject; and shall indemnify the bank(s) against any liabilities or expenses resulting from the failure or delay in the payment of such expenses and taxes. Expenses shall include telephone, fax, EDI transmissions or others relating to any breach by the borrower of its obligations, to events of default or to any amendment to this contract suggested by the borrower'.

Representatives of bank(s):

'Each bank is authorised hereby to nominate a representative having a power of attorney in relation to this contract and to the operative documents, to be vested with the powers, rights and discretions delegated hereby or thereby to him. Such representatives shall inform the interested bank of any notice or document for the

borrower, the existence of a default from the borrower, and shall act in accordance with the requirements of the situation and with due regard to the instructions of the interested bank. A representative is not required to ascertain of borrower's representations. '

If there is a security trustee its powers may be defined as follows:

'

... he has an absolute and uncontrolled discretion to the exercise and non exercise of rights, powers, authorities and trusts vested upon him, and may delegate by virtue of a power of attorney such rights, powers, authorities and trusts to any person whom he has exercised reasonable care in the selection thereof, and he is entitled to revoke such powers.

Calculation of interest:

'Interest and commitment fee shall accrue from day to day and be calculated considering a year as 360 days (or 365 days if required). The agent shall maintain the books of all accounts. In any legal action or proceeding arising out of or in connection with this contract, the entries made in the accounts maintained by the agent shall be a prima facie evidence (or a conclusive evidence if so required) of the sums stated therein.

Remedies and waivers:

'No failure to proceed to, nor any delay in practising any right or remedy, by the agent, the security trustee and/or

the bank(s) shall be deemed a waiver thereof. Such rights and remedies are provided for herein as cumulative and not exhaustive or exclusive of any rights or remedies provided by law.

Severability or partial invalidity:

'Where any of the terms hereof, becomes at any time, illegal, invalid or unenforceable under the law of any jurisdiction, either the legality, validity or enforceability of the rest of the terms hereof, nor the legality, validity or enforceability of such terms under the law of any other jurisdiction shall in any way be affected thereby'.

Insurance:

'The borrower shall deliver to the security trustee the insurance and/or reinsurance policies issued in favour of the bank(s) as well as their renewals before each expiry. Policies shall be in accordance with sound international practice.

Signature:

'As witness of the foregoing the hands of the duly authorised representatives of the parties hereto the day and year first before written.'

SPECIMEN OF LEGAL OPINION WITH RESPECT TO THE BORROWER

The lending bank may ask the borrower to submit a legal opinion from a law firm in his country. In our example the bank in Bahrain may ask the borrower from Syria to provide a legal opinion from a law firm in the following form:

Dear Sirs,

This opinion is requested in connection with the loan granted by you to the borrower X Company. In this regard I have examined the documents of constitution of the borrower and I am of the opinion that in accordance with the laws and regulations of Syria:

1. The borrower is duly organised and validly existing as a joint stock company under the laws of Syria, having full power and authority to conduct its business as it is being conducted;
2. The borrower has full power, authority and legal right to sign, execute and deliver the loan agreement and to perform all the terms and conditions thereof;
3. In accordance with the laws of Syria and the borrower's articles of incorporation and by laws, the borrower has been validly authorised by a decision of ….. on ….. to raise up the funds loaned;
4. The borrower has obtained from the Syrian competent authorities the approvals necessary for the validity of the loan and authorising its execution and performance

especially in relation to transfers in foreign currency required for the settlement of the loan;

5. The loan is in proper legal form for the enforcement thereof and constitutes the legal, valid and binding obligation of the borrower;
6. The execution and performance by the borrower of the loan agreement do not contravene, nor violate any of the provisions of the articles of incorporation and by laws of the borrower and do not result in the violation by the borrower of any covenant or contractual restriction;
7. The signature, execution, delivery and the performance of the loan agreement are not contrary to any law or regulation, decree or official decision of Syria;
8. No provision of the loan agreement is contrary to public policy in Syria;
9. It is not necessary in order to (a) ensure the legality and validity or (b) enforceability or admissibility in evidence in the courts of Syria of the loan agreement that it be stamped or registered, or that any tax be paid or any authorisation obtained in Syria;
10. The lender shall not be deemed to be resident, domiciled, doing business or subject to tax in Syria by reason only of the execution, performance or enforcement of the loan agreement;
11. The loan agreement is a commercial act;
12. The borrower has validly waived any immunity from jurisdiction or execution to which it is or may be entitled.

[A similar legal opinion from a law firm may be required from a bank giving a guarantee or a counter guarantee for the borrower.]

Reference books
advised to form part of your library

1. Robert Bradgate: Drafting standard terms of trading, 1994.

2. Negotiating and drafting of international contracts by a group of writers within the Study Group, London, 1997

3. ICC : Unidroit principles of contracts, 1996 (publication No. 490/1)

4. ICC : Incoterms 1990

5. Uncitral legal guide on drawing up international contracts for the construction of international works, 1988.

6. UN Convention on the limitation period of the international sale of goods, 1974, amended 1980.

7. UN International sale of goods convention, 1980.

8. Mohsen Shafik: International sale of goods convention, 1987, (in Arabic).

9. Black's Law Dictionary.

10. Mohieldin I. Alameldin: Legal and Economic Dictionary (English - French - Arabic) 1997.

CONTENTS

Annex containing:

ANNEX

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The states parties to this convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

CONVENTION DES NATIONS UNIES SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES

Les États parties à la présente Convention

Ayant présent à l'esprit les objectifs généraux inscrits dans les résolutions relatives à l'instauration d'un nouvel ordre économique international que l'Assemblée générale a adoptées à sa sixième session extraordinaire,

Considérant que le développement du commerce international sur la base de l'égalité et des avantages mutuels est un élément important dans la promotion de relations amicales entre les États,

Estimant que l'adoption de règles uniformes applicables aux contrats de vente internationale de marchandises et compatibles avec les différents systèmes sociaux, économiques et juridiques contribuera à l'élimination des obstacles juridiques aux échanges internationaux et favorisera le développement du commerce international,

Sont convenues de ce qui suit :

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

CHAPTER I

SPHERE OF APPLICATION

Article 1

1. This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(*a*) when the States are Contracting States; or

(*b*) when the rules of private international law lead to the application of the law of a Contracting State.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(*a*) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that

PREMIÈRE PARTIE

CHAMP D'APPLICATION ET DISPOSITIONS GÉNÉRALES

CHAPITRE I

CHAMP D'APPLICATION

Article premier

1. La présente Convention s'applique aux contrats de vente de marchandises entre des parties ayant leur établissement dans des États différents :

a) lorsque ces États sont des États contractants; ou

b) lorsque les règles du droit international privé mènent à l'application de la loi d'un État contractant.

2. Il n'est pas tenu compte du fait que les parties ont leur établissement dans des États différents lorsque ce fait ne ressort ni du contrat, ni de transactions antérieures entre les parties, ni de renseignements donnés par elles à un moment quelconque avant la conclusion ou lors de la conclusion du contrat.

3. Ni la nationalité des parties ni le caractère civil ou commercial des parties ou du contrat ne sont pris en considération pour l'application de la présente Convention.

Article 2

La présente Convention ne régit pas les ventes :

a) de marchandises achetées pour un usage personnel, familial ou domestique, à moins que le vendeur, à un moment quelconque avant la conclusion ou lors de la conclusion du

the goods were bought for any such use;

(*b*) by auction;

(*c*) on execution or otherwise by authority of law;

(*d*) of stocks, shares, investment securities, negotiable instruments or money;

(*e*) of ships, vessels, hovercraft or aircraft;

(*f*) of electricity.

Article 3

1. Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

2. This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

contrat, n'ait pas su et n'ait pas été censé savoir que ces marchandises étaient achetées pour un tel usage;

b) aux enchères;

c) sur saisie ou de quelque autre manière par autorité de justice;

d) de valeurs mobilières, effets de commerce et monnaies;

e) de navires, bateaux, aéroglisseurs et aéronefs;

f) d'électricité.

Article 3

1. Sont réputés ventes les contrats de fourniture de marchandises à fabriquer ou à produire, à moins que la partie qui commande celles-ci n'ait à fournir une part essentielle des éléments matériels nécessaires à cette fabrication ou production.

2. La présente Convention ne s'applique pas aux contrats dans lesquels la part prépondérante de l'obligation de la partie qui fournit les marchandises consiste en une fourniture de main-d'oeuvre ou d'autres services.

Article 4

La présente Convention régit exclusivement la formation du contrat de vente et les droits et obligations qu'un tel contrat fait naître entre le vendeur et l'acheteur. En particulier, sauf disposition contraire expresse de la présente Convention, celle-ci ne concerne pas :

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

CHAPTER II

GENERAL PROVISIONS

Article 7

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

a) la validité du contrat ni celle d'aucune de ses clauses non plus que celle des usages;

b) les effets que le contrat peut avoir sur la propriété des marchandises vendues.

Article 5

La présente Convention ne s'applique pas à la responsabilité du vendeur pour décès ou lésions corporelles causés à quiconque par les marchandises.

Article 6

Les parties peuvent exclure l'application de la présente Convention ou, sous réserve des dispositions de l'article 12, déroger à l'une quelconque de ses dispositions ou en modifier les effets.

CHAPITRE II

DISPOSITIONS GÉNÉRALES

Article 7

1. Pour l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application ainsi que d'assurer le respect de la bonne foi dans le commerce international.

2. Les questions concernant les matières régies par la présente Convention et qui ne sont pas expressément tranchées par elle seront réglées selon les principes généraux dont elle s'inspire ou, à défaut de ces principes, conformément à la loi applicable en vertu des règles du droit international privé.

Article 8

1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

2. If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 8

1. Aux fins de la présente Convention, les indications et les autres comportements d'une partie doivent être interprétés selon l'intention de celle-ci lorsque l'autre partie connaissait ou ne pouvait ignorer cette intention.

2. Si le paragraphe précédent n'est pas applicable, les indications et autres comportements d'une partie doivent être interprétés selon le sens qu'une personne raisonnable de même qualité que l'autre partie, placée dans la même situation, leur aurait donné.

3. Pour déterminer l'intention d'une partie ou ce qu'aurait compris une personne raisonnable, il doit être tenu compte des circonstances pertinentes, notamment des négociations qui ont pu avoir lieu entre les parties, des habitudes qui se sont établies entre elles, des usages et de tout comportement ultérieur des parties.

Article 9

1. Les parties sont liées par les usages auxquels elles ont consenti et par les habitudes qui se sont établies entre elles.

2. Sauf convention contraire des parties, celles-ci sont réputées s'être tacitement référées dans le contrat et pour sa formation à tout usage dont elles avaient connaissances ou auraient dû avoir connaissance et qui, dans le commerce international, est largement connu et régulièrement observé par les parties à des contrats de même type dans la branche commerciale considérée.

Article 10

For the purposes of this Convention:

(*a*) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(*b*) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 10

Aux fins de la présente Convention :

a) si une partie a plus d'un établissement, l'établissement à prendre en considération est celui qui a la relation la plus étroite avec le contrat et son exécution eu égard aux circonstances connues des parties ou envisagées par elles à un moment quelconque avant la conclusion ou lors de la conclusion du contrat;

b) si une partie n'a pas d'établissement, sa résidence habituelle en tient lieu.

Article 11

Le contrat de vente n'a pas à être conclu ni constaté par écrit et n'est soumis à aucune autre condition de forme. Il peut être prouvé par tous moyens, y compris par témoins.

Article 12

Toute disposition de l'article 11, de l'article 29 ou de la deuxième partie de la présente Convention autorisant une forme autre que la forme écrite, soit pour la conclusion ou pour la modification ou la résiliation amiable d'un contrat de vente, soit pour toute offre, acceptation ou autre manifestation d'intention, ne s'applique pas dès lors qu'une des parties a son établissement dans un État contractant qui a fait une déclaration conformément à l'article 96 de la présente Convention. Les parties ne peuvent déroger au présent article ni en modifier les effets.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

Article 13

Aux fins de la présente Convention, le terme «écrit» doit s'entendre également des communications adressées par télégramme ou par télex.

PART II

FORMATION OF THE CONTRACT

DEUXIÈME PARTIE

FORMATION DU CONTRAT

Article 14

1. A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

2. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 14

1. Une proposition de conclure un contrat adressée à une ou plusieurs personnes déterminées constitue une offre si elle est suffisamment précise et si elle indique la volonté de son auteur d'être lié en cas d'acceptation. Une proposition est suffisamment précise lorsqu'elle désigne les marchandises et, expressément ou implicitement, fixe la quantité et le prix ou donne des indications permettant de les déterminer.

2. Une proposition adressée à des personnes indéterminées est considérée seulement comme une invitation à l'offre, à moins que la personne qui a fait la proposition n'ait clairement indiqué le contraire.

Article 15

1. An offer becomes effective when it reaches the offeree.

2. An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 15

1. Une offre prend effet lorsqu'elle parvient au destinataire.

2. Une offre, même si elle est irrévocable, peut être rétractée si la rétractation parvient au destinataire avant ou en même temps que l'offre.

Article 16

1. Until a contract is concluded an offer may be revoked if the revocation

Article 16

1. Jusqu'à ce qu'un contrat ait été conclu, une offre peut être révoquée si la

reaches the offeree before he has dispatched an acceptance.

2. However, an offer cannot be revoked:

(*a*) if it indicates, whether by stating a fixed-time for acceptance or otherwise, that it is irrevocable; or

(*b*) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

2. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

révocation parvient au destinataire avant que celui-ci ait expédié une acceptation.

2. Cependant, une offre ne peut être révoquée :

a) si elle indique, en fixant un délai déterminé pour l'acceptation, ou autrement, qu'elle est irrévocable; ou

b) s'il était raisonnable pour le destinataire de considérer l'offre comme irrévocable et s'il a agi en conséquence.

Article 17

Une offre, même irrévocable, prend fin lorsque son rejet parvient à l'auteur de l'offre.

Article 18

1. Une déclaration ou autre comportement du destinataire indiquant qu'il acquiesce à une offre constitue une acceptation. Le silence ou l'inaction à eux seuls ne peuvent valoir acceptation.

2. L'acceptation d'une offre prend effet au moment où l'indication d'acquiescement parvient à l'auteur de l'offre. L'acceptation ne prend pas effet si cette indication ne parvient pas à l'auteur de l'offre dans le délai qu'il a stipulé ou, à défaut d'une telle stipulation, dans un délai raisonnable, compte tenu des circonstances de la transaction et de la rapidité des moyens de communication utilisés par l'auteur de l'offre. Une offre verbale doit être acceptée immédiatement, à moins que les circonstances n'impliquent le contraire.

3. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

1. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

2. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

3. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

3. Cependant, si, en vertu de l'offre, des habitudes qui se sont établies entre les parties ou des usages, le destinataire de l'offre peut indiquer qu'il acquiesce en accomplissant un acte se rapportant, par exemple, à l'expédition des marchandises ou au paiement du prix, sans communication à l'auteur de l'offre, l'acceptation prend effet au moment où cet acte est accompli, pour autant qu'il le soit dans les délais prévus par le paragraphe précédent.

Article 19

1. Une réponse qui tend à être l'acceptation d'une offre, mais qui contient des additions, des limitations ou autres modifications, est un rejet de l'offre et constitue une contre-offre.

2. Cependant, une réponse qui tend à être l'acceptation d'une offre, mais qui contient des éléments complémentaires ou différents n'altérant pas substantiellement les termes de l'offre, constitue une acceptation, à moins que l'auteur de l'offre, sans retard injustifié, n'en relève les différences verbalement ou n'adresse un avis à cet effet. S'il ne le fait pas, les termes du contrat sont ceux de l'offre, avec les modifications comprises dans l'acceptation.

3. Des éléments complémentaires ou différents relatifs notamment au prix, au paiement, à la qualité et à la quantité des marchandises, au lieu et au moment de la livraison, à l'étendue de la responsabilité d'une partie à l'égard de l'autre ou au règlement des différends, sont considérés comme altérant substantiellement les termes de l'offre.

Article 20

1. A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

2. Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

1. A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

2. If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 20

1. Le délai d'acceptation fixé par l'auteur de l'offre dans un télégramme ou une lettre commence à courir au moment où le télégramme est remis pour expédition ou à la date qui apparaît sur la lettre ou, à défaut, à la date qui apparaît sur l'enveloppe. Le délai d'acceptation que l'auteur de l'offre fixe par téléphone, par télex ou par d'autres moyens de communication instantanés commence à courir au moment où l'offre parvient au destinataire.

2. Les jours fériés ou chômés qui tombent pendant que court le délai d'acceptation sont comptés dans le calcul de ce délai. Cependant, si la notification ne peut être remise à l'adresse de l'auteur de l'offre le dernier jour du délai, parce que celui-ci tombe un jour férié ou chômé au lieu d'établissement de l'auteur de l'offre, le délai est prorogé jusqu'au premier jour ouvrable suivant.

Article 21

1. Une acceptation tardive produit néanmoins effet en tant qu'acceptation si, sans retard, l'auteur de l'offre en informe verbalement le destinataire ou lui adresse un avis à cet effet.

2. Si la lettre ou autre écrit contenant une acceptation tardive révèle qu'elle a été expédiée dans des conditions telles que, si sa transmission avait été régulière, elle serait parvenue à temps à l'auteur de l'offre, l'acceptation tardive produit effet en tant qu'acceptation à moins que, sans retard, l'auteur de l'offre n'informe verbalement le destinataire de l'offre qu'il considère

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

que son offre avait pris fin ou qu'il ne lui adresse un avis à cet effet.

Article 22

L'acceptation peut être rétractée si la rétractation parvient à l'auteur de l'offre avant le moment où l'acceptation aurait pris effet ou à ce moment.

Article 23

Le contrat est conclu au moment où l'acceptation d'une offre prend effet conformément aux dispositions de la présente Convention.

Article 24

Aux fins de la présente partie de la Convention, une offre, une déclaration d'acceptation ou toute autre manifestation d'intention «parvient» à son destinataire lorsqu'elle lui est faite verbalement ou est délivrée par tout autre moyen au destinataire lui-même, à son établissement, à son adresse postale ou, s'il n'a pas d'établissement ou d'adresse postale, à sa résidence habituelle.

PART III

SALE OF GOODS

CHAPTER I

GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound

TROISIÈME PARTIE

VENTE DE MARCHANDISES

CHAPITRE I

DISPOSITIONS GÉNÉRALES

Article 25

Une contravention au contrat commise par l'une des parties est essentielle lorsqu'elle cause à l'autre partie un préjudice tel qu'elle la prive substantiellement de ce que celle-ci était en droit d'attendre du contrat, à moins que la partie en défaut n'ait pas prévu un tel résultat et qu'une personne raisonnable de même qualité placée dans la même situation ne l'aurait pas prévu non plus.

Article 26

Une déclaration de résolution du contrat n'a d'effet que si elle est faite par notification à l'autre partie.

Article 27

Sauf disposition contraire expresse de la présente partie de la Convention, si une notification, demande ou autre communication est faite par une partie au contrat conformément à la présente partie et par un moyen approprié aux circonstances, un retard ou une erreur dans la transmission de la communication ou le fait qu'elle n'est pas arrivée à destination ne prive pas cette partie au contrat du droit de s'en prévaloir.

Article 28

Si, conformément aux dispositions de la présente Convention, une partie a le droit d'exiger de l'autre l'exécution d'une obligation, un tribunal n'est tenu

to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

1. A contract may be modified or terminated by the mere agreement of the parties.

2. A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

CHAPTER II

OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

SECTION I

Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

d'ordonner l'exécution en nature que s'il le ferait en vertu de son propre droit pour des contrats de vente semblables non régis par la présente Convention.

Article 29

1. Un contrat peut être modifié ou résilié par accord amiable entre les parties.

2. Un contrat écrit qui contient une disposition stipulant que toute modification ou résiliation amiable doit être faite par écrit ne peut être modifié ou résilié à l'amiable sous une autre forme. Toutefois, le comportement de l'une des parties peut l'empêcher d'invoquer une telle disposition si l'autre partie s'est fondée sur ce comportement.

CHAPITRE II

OBLIGATIONS DU VENDEUR

Article 30

Le vendeur s'oblige, dans les conditions prévues au contrat et par la présente Convention, à livrer les marchandises, à en transférer la propriété et, s'il y a lieu, à remettre les documents s'y rapportant.

SECTION I

Livraison des marchandises et remise des documents

Article 31

Si le vendeur n'est pas tenu de livrer les marchandises en un autre lieu particulier, son obligation de livraison consiste :

(*a*) if the contract of sale involves carriage of the goods - in handing the good over to the first carrier for transmission to the buyer;

(*b*) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(*c*) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

1. If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

2. If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the cir-

a) lorsque le contrat de vente implique un transport des marchandises, à remettre les marchandises au premier transporteur pour transmission à l'acheteur;

b) lorsque, dans les cas non visés au précédent alinéa, le contrat porte sur un corps certain ou sur une chose de genre qui doit être prélevée sur une masse déterminée ou qui doit être fabriquée ou produite et lorsque, au moment de la conclusion du contrat, les parties savaient que les marchandises se trouvaient ou devaient être fabriquées ou produites en un lieu particulier, à mettre les marchandises à la disposition de l'acheteur en ce lieu;

c) dans les autres cas, à mettre les marchandises à la disposition de l'acheteur au lieu où le vendeur avait son établissement au moment de la conclusion du contrat.

Article 32

1. Si, conformément au contrat ou à la présente Convention, le vendeur remet les marchandises à un transporteur et si les marchandises ne sont pas clairement identifiées aux fins du contrat par l'apposition d'un signe distinctif sur les marchandises, par des documents de transport ou par tout autre moyen, le vendeur doit donner à l'acheteur avis de l'expédition en désignant spécifiquement les marchandises.

2. Si le vendeur est tenu de prendre des dispositions pour le transport des marchandises, il doit conclure les contrats nécessaires pour que le transport soit effectué jusqu'au lieu prévu, par les

cumstances and according to the usual terms for such transportation.

3. If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(*a*) if a date is fixed by or determinable from the contract, on that date;

(*b*) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(*c*) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as

moyens de transport appropriés aux circonstances et selon les conditions usuelles pour un tel transport.

3. Si le vendeur n'est pas tenu de souscrire lui-même une assurance de transport, il doit fournir à l'acheteur, à la demande de celui-ci, tous renseignements dont il dispose qui sont nécessaires à la conclusion de cette assurance.

Article 33

Le vendeur doit livrer les marchandises :

a) si une date est fixée par le contrat ou déterminable par référence au contrat, à cette date;

b) si une période de temps est fixée par le contrat ou déterminable par référence au contrat, à un moment quelconque au cours de cette période, à moins qu'il ne résulte des circonstances que c'est à l'acheteur de choisir une date; ou

c) dans tous les autres cas, dans un délai raisonnable à partir de la conclusion du contrat.

Article 34

Si le vendeur est tenu de remettre les documents se rapportant aux marchandises, il doit s'acquitter de cette obligation au moment, au lieu et dans la forme prévus au contrat. En cas de remise anticipée, le vendeur conserve, jusqu'au moment prévu pour la remise, le droit de réparer tout défaut de conformité des documents, à condition que l'exercice de ce droit ne cause à l'acheteur ni inconvénients ni frais déraisonnables. Toutefois, l'acheteur

provided for in this Convention.

SECTION II

Conformity of the goods and third party claims

Article 35

1. The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

2. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(*a*) are fit for the purposes for which goods of the same description would ordinarily be used;

(*b*) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(*c*) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(*d*) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and

conserve le droit de demander des dommages-intérêts conformément à la présente Convention.

SECTION II

Conformité des marchandises et droits ou prétentions de tiers

Article 35

1. Le vendeur doit livrer des marchandises dont la quantité, la qualité et le type répondent à ceux qui sont prévus au contrat, et dont l'emballage ou le conditionnement correspond à celui qui est prévu au contrat.

2. A moins que les parties n'en soient convenues autrement, les marchandises ne sont conformes au contrat que si :

a) elles sont propres aux usages auxquels serviraient habituellement des marchandises du même type;

b) elles sont propres à tout usage spécial qui a été porté expressément ou tacitement à la connaissance du vendeur au moment de la conclusion du contrat, sauf s'il résulte des circonstances que l'acheteur ne s'en est pas remis à la compétence ou à l'appréciation du vendeur ou qu'il n'était pas raisonnable de sa part de la faire;

c) elles possèdent les qualités d'une marchandise que le vendeur a présentée à l'acheteur comme échantillon ou modèle;

d) elles sont emballées ou conditionnées selon le mode habituel pour les marchandises du même type ou, à défaut de mode habituel, d'une ma-

protect the goods.

3. The seller is not liable under subparagraphs (*a*) to (*d*) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

1. The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

2. The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.

nière propre à les conserver et à les protéger.

3. Le vendeur n'est pas responsable, au regard des alinéas *a* à *d* du paragraphe précédent, d'un défaut de conformité que l'acheteur connaissait ou ne pouvait ignorer au moment de la conclusion du contrat.

Article 36

1. Le vendeur est responsable, conformément au contrat et à la présente Convention, de tout défaut de conformité qui existe au moment du transfert des risques à l'acheteur, même si ce défaut n'apparaît qu'ultérieurement.

2. Le vendeur est également responsable de tout défaut de conformité qui survient après le moment indiqué au paragraphe précédent et qui est imputable à l'inexécution de l'une quelconque de ses obligations, y compris à un manquement à une garantie que, pendant une certaine période, les marchandises resteront propres à leur usage normal ou à un usage spécial ou conserveront des qualités ou caractéristiques spécifiées.

Article 37

En cas de livraison anticipée, le vendeur a le droit, jusqu'à la date prévue pour la livraison, soit de livrer une partie ou une quantité manquante, ou des marchandises nouvelles en remplacement des marchandises non conformes au contrat, soit de réparer tout défaut de conformité des marchandises, à condition que l'exercice de ce droit ne cause à l'acheteur ni inconvénients ni frais déraisonnables. Toutefois, l'ache-

However, the buyer retains any right to claim damages as provided for in this Convention.

teur conserve le droit de demander des dommages-intérêts conformément à la présente Convention.

Article 38

1. The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

3. If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 38

1. L'acheteur doit examiner les marchandises ou les faire examiner dans un délai aussi bref que possible eu égard aux circonstances.

2. Si le contrat implique un transport des marchandises, l'examen peut être différé jusqu'à leur arrivée à destination.

3. Si les marchandises sont déroutées ou réexpédiées par l'acheteur sans que celui-ci ait eu raisonnablement la possibilité de les examiner et si, au moment de la conclusion du contrat, le vendeur connaissait ou aurait dû connaître la possibilité de ce déroutage ou de cette réexpédition, l'examen peut être différé jusqu'à l'arrivée des marchandises à leur nouvelle destination.

Article 39

1. The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

2. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 39

1. L'acheteur est déchu du droit de se prévaloir d'un défaut de conformité s'il ne le dénonce pas au vendeur, en précisant la nature de ce défaut, dans un délai raisonnable à partir du moment où il l'a constaté ou aurait dû le constater.

2. Dans tous les cas, l'acheteur est déchu du droit de se prévaloir d'un défaut de conformité, s'il ne le dénonce pas au plus tard dans un délai de deux ans à compter de la date à laquelle les marchandises lui ont été effectivement remises, à moins que ce délai ne soit incompatible avec la durée d'une garantie contractuelle.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

1. The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(*a*) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(*b*) in any other case, under the law of the State where the buyer has his place of business.

Article 40

Le vendeur ne peut pas se prévaloir des dispositions des articles 38 et 39 lorsque le défaut de conformité porte sur des faits qu'il connaissait ou ne pouvait ignorer et qu'il n'a pas révélés à l'acheteur.

Article 41

Le vendeur doit livrer les marchandises libres de tout droit ou prétention d'un tiers, à moins que l'acheteur n'accepte de prendre les marchandises dans ces conditions. Toutefois, si ce droit ou cette prétention est fondé sur la propriété industrielle ou autre propriété intellectuelle, l'obligation du vendeur est régie par l'article 42.

Article 42

1. Le vendeur doit livrer les marchandises libres de tout droit ou prétention d'un tiers fondé sur la propriété industrielle ou autre propriété intellectuelle, qu'il connaissait ou ne pouvait ignorer au moment de la conclusion du contrat, à condition que ce droit ou cette prétention soit fondé sur la propriété industrielle ou autre propriété intellectuelle :

a) en vertu de la loi de l'État où les marchandises doivent être revendues ou utilisées, si les parties ont envisagé au moment de la conclusion du contrat que les marchandises seraient revendues ou utilisées dans cet État; ou

b) dans tous les autres cas, en vertu de la loi de l'État où l'acheteur a son établissement.

2. The obligation of the seller under the preceding paragraph does not extend to cases where:

(*a*) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(*b*) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

1. The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

2. The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph 1 of article 39 and paragraph 1 of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

2. Dans les cas suivants, le vendeur n'est pas tenu de l'obligation prévue au paragraphe précédent :

a) au moment de la conclusion du contrat, l'acheteur connaissait ou ne pouvait ignorer l'existence du droit ou de la prétention; ou

b) le droit ou la prétention résulte de ce que le vendeur s'est conformé aux plans techniques, dessins, formules ou autres spécifications analogues fournis par l'acheteur.

Article 43

1. L'acheteur perd le droit de se prévaloir des dispositions des articles 41 et 42 s'il ne dénonce pas au vendeur le droit ou la prétention du tiers, en précisant la nature de ce droit ou de cette prétention, dans un délai raisonnable à partir du moment où il en a eu connaissance ou aurait dû en avoir connaissance.

2. Le vendeur ne peut pas se prévaloir des dispositions du paragraphe précédent s'il connaissait le droit ou la prétention du tiers et sa nature.

Article 44

Nonobstant les dispositions du paragraphe 1 de l'article 39 et du paragraphe 1 de l'article 43, l'acheteur peut réduire le prix conformément à l'article 50 ou demander des dommages-intérêts, sauf pour le gain manqué, s'il a une excuse raisonnable pour n'avoir pas procédé à la dénonciation requise.

SECTION III

Remedies for breach of contract by the seller

Article 45

1. If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(*a*) exercise the rights provided in articles 46 to 52;

(*b*) claim damages as provided in articles 74 to 77.

2. The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

3. No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

1. The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

2. If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time there-

SECTION III

Moyens dont dispose l'acheteur en cas de contravention au contrat par le vendeur

Article 45

1. Si le vendeur n'a pas exécuté l'une quelconque des obligations résultant pour lui du contrat de vente ou de la présente Convention, l'acheteur est fondé à :

a) exercer les droits prévus aux articles 46 à 52;

b) demander les dommages-intérêts prévus aux articles 74 à 77.

2. L'acheteur ne perd pas le droit de demander des dommages-intérêts lorsqu'il exerce son droit de recourir à un autre moyen.

3. Aucun délai de grâce ne peut être accordé au vendeur par un juge ou par un arbitre lorsque l'acheteur se prévaut d'un des moyens dont il dispose en cas de contravention au contrat.

Article 46

1. L'acheteur peut exiger du vendeur l'exécution de ses obligations, à moins qu'il ne se soit prévalu d'un moyen incompatible avec cette exigence.

2. Si les marchandises ne sont pas conformes au contrat, l'acheteur ne peut exiger du vendeur la livraison de marchandises de remplacement que si le défaut de conformité constitue une contravention essentielle au contrat et si cette livraison est demandée au moment de la dénonciation du défaut de

after.

conformité faite conformément à l'article 39 ou dans un délai raisonnable à compter de cette dénonciation.

3. If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

3. Si les marchandises ne sont pas conformes au contrat, l'acheteur peut exiger du vendeur qu'il répare le défaut de conformité, à moins que cela ne soit déraisonnable compte tenu de toutes les circonstances. La réparation doit être demandée au moment de la dénonciation du défaut de conformité faite conformément à l'article 39 ou dans un délai raisonnable à compter de cette dénonciation.

Article 47

1. The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

2. Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 47

1. L'acheteur peut impartir au vendeur un délai supplémentaire de durée raisonnable pour l'exécution de ses obligations.

2. A moins qu'il n'ait reçu du vendeur une notification l'informant que celui-ci n'exécuterait pas ses obligations dans le délai ainsi imparti, l'acheteur ne peut, avant l'expiration de ce délai, se prévaloir d'aucun des moyens dont il dispose en cas de contravention au contrat. Toutefois, l'acheteur ne perd pas, de ce fait, le droit de demander des dommages-intérêts pour retard dans l'exécution.

Article 48

1. Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. How-

Article 48

1. Sous réserve de l'article 49, le vendeur peut, même après la date de la livraison, réparer à ses frais tout manquement à ses obligations, à condition que cela n'entraîne pas un retard déraisonnable et ne cause à l'acheteur ni inconvénients déraisonnables ni incertitude quant au remboursement par le vendeur des frais faits par l'acheteur.

ever, the buyer retains any right to claim damages as provided for in this Convention.

2. If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

3. A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

4. A request or notice by the seller under paragraph 2 or 3 of this article is not effective unless received by the buyer.

Article 49

1. The buyer may declare the contract avoided:

(*a*) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(*b*) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph 1 of article 47 or declares that

Toutefois, l'acheteur conserve le droit de demander des dommages-intérêts conformément à la présente Convention.

2. Si le vendeur demande à l'acheteur de lui faire savoir s'il accepte l'exécution et si l'acheteur ne lui répond pas dans un délai raisonnable, le vendeur peut exécuter ses obligations dans le délai qu'il a indiqué dans sa demande. L'acheteur ne peut, avant l'expiration de ce délai, se prévaloir d'un moyen incompatible avec l'exécution par le vendeur de ses obligations.

3. Lorsque le vendeur notifie à l'acheteur son intention d'exécuter ses obligations dans un délai déterminé, il est présumé demander à l'acheteur de lui faire connaître sa décision conformément au paragraphe précédent.

4. Une demande ou une notification faite par le vendeur en vertu des paragraphes 2 ou 3 du présent article n'a d'effet que si elle est reçue par l'acheteur.

Article 49

1. L'acheteur peut déclarer le contrat résolu :

a) si l'inexécution par le vendeur de l'une quelconque des obligations résultant pour lui du contrat ou de la présente Convention constitue une contravention essentielle au contrat; ou

b) en cas de défaut de livraison, si le vendeur ne livre pas les marchandises dans le délai supplémentaire imparti par l'acheteur conformément au paragraphe 1 de l'article 47

he will not deliver within the period so fixed.

2. However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(*a*) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(*b*) in respect of any breach other than late delivery, within a reasonable time:

(*i*) after he knew or ought to have known of the breach;

(*ii*) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph 1 of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(*iii*) after the expiration of any additional period of time indicated by the seller in accordance with paragraph 2 of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

ou s'il déclare qu'il ne les livrera pas dans le délai ainsi imparti.

2. Cependant, lorsque le vendeur a livré les marchandises, l'acheteur est déchu du droit de déclarer le contrat résolu s'il ne l'a pas fait :

a) en cas de livraison tardive, dans un délai raisonnable à partir du moment où il a su que la livraison avait été effectuée;

b) en cas de contravention autre que la livraison tardive, dans un délai raisonnable :

i) à partir du moment où il a eu connaissance ou aurait dû avoir connaissance de cette contravention;

ii) après l'expiration de tout délai supplémentaire imparti par l'acheteur conformément au paragraphe 1 de l'article 47 ou après que le vendeur a déclaré qu'il n'exécuterait pas ses obligations dans ce délai supplémentaire; ou

iii) après l'expiration de tout délai supplémentaire indiqué par le vendeur conformément au paragraphe 2 de l'article 48 ou après que l'acheteur a déclaré qu'il n'accepterait pas l'exécution.

Article 50

En cas de défaut de conformité des marchandises au contrat, que le prix ait été ou non déjà payé, l'acheteur peut réduire le prix proportionnellement à la différence entre la valeur que les marchandises effectivement livrées avaient au moment de la livraison et la valeur que des marchandises confor-

However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

1. If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

2. The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

1. If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

2. If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

...nes auraient eue à ce moment. Cependant, si le vendeur répare tout manquement à ses obligations conformément à l'article 37 ou à l'article 48 ou si l'acheteur refuse d'accepter l'exécution par le vendeur conformément à ces articles, l'acheteur ne peut réduire le prix.

Article 51

1. Si le vendeur ne livre qu'une partie des marchandises ou si une partie seulement des marchandises livrées est conforme au contrat, les articles 46 à 50 s'appliquent en ce qui concerne la partie manquante ou non conforme.

2. L'acheteur ne peut déclarer le contrat résolu dans sa totalité que si l'inexécution partielle ou le défaut de conformité constitue une contravention essentielle au contrat.

Article 52

1. Si le vendeur livre les marchandises avant la date fixée, l'acheteur a la faculté d'en prendre livraison ou de refuser d'en prendre livraison.

2. Si le vendeur livre une quantité supérieure à celle prévue au contrat, l'acheteur peut accepter ou refuser de prendre livraison de la quantité excédentaire. Si l'acheteur accepte d'en prendre livraison en tout ou en partie, il doit la payer au tarif du contrat.

CHAPTER III

OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

SECTION I

Payment of the price

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

CHAPITRE III

OBLIGATIONS DE L'ACHETEUR

Article 53

L'acheteur s'oblige, dans les conditions prévues au contrat et par la présente Convention, à payer le prix et à prendre livraison des marchandises.

SECTION I

Paiement du prix

Article 54

L'obligation qu'a l'acheteur de payer le prix comprend celle de prendre les mesures et d'accomplir les formalités destinées à permettre le paiement du prix qui sont prévues par le contrat ou par les lois et les règlements.

Article 55

Si la vente est valablement conclue sans que le prix des marchandises vendues ait été fixé dans le contrat expressément ou implicitement ou par une disposition permettant de le déterminer, les parties sont réputées, sauf indications contraires, s'être tacitement référées au prix habituellement pratiqué au moment de la conclusion du contrat, dans la branche commerciale considérée, pour les mêmes marchandises vendues dans des circonstances comparables.

Article 56

Si le prix est fixé d'après le poids des marchandises, c'est le poids net qui, en cas de doute, détermine ce prix.

Article 57

1. If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(*a*) at the seller's place of business; or

(*b*) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

2. The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

1. If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

2. If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

3. The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 57

1. Si l'acheteur n'est pas tenu de payer le prix en un autre lieu particulier, il doit payer le vendeur :

a) à l'établissement de celui-ci; ou

b) si le paiement doit être fait contre la remise des marchandises ou des documents, au lieu de cette remise.

2. Le vendeur doit supporter toute augmentation des frais accessoires au paiement qui résultent de son changement d'établissement après la conclusion du contrat.

Article 58

1. Si l'acheteur n'est pas tenu de payer le prix à un autre moment déterminé, il doit le payer lorsque, conformément au contrat et à la présente Convention, le vendeur met à sa disposition soit les marchandises, soit des documents représentatifs des marchandises. Le vendeur peut faire du paiement une condition de la remise des marchandises ou des documents.

2. Si le contrat implique un transport des marchandises, le vendeur peut en faire l'expédition sous condition que celles-ci ou les documents représentatifs ne seront remis à l'acheteur que contre paiement du prix.

3. L'acheteur n'est pas tenu de payer le prix avant d'avoir eu la possibilité d'examiner les marchandises, à moins que les modalités de livraison ou de paiement dont sont convenues les parties ne lui en laissent pas la possibilité.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

SECTION II

Taking delivery

Article 60

The buyer's obligation to take delivery consists:

(*a*) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(*b*) in taking over the goods.

SECTION III

Remedies for breach of contract by the buyer

Article 61

1. If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(*a*) exercise the rights provided in articles 62 to 65;

(*b*) claim damages as provided in articles 74 to 77.

2. The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Article 59

L'acheteur doit payer le prix à la date fixée au contrat ou résultant du contrat et de la présente Convention, sans qu'il soit besoin d'aucune demande ou autre formalité de la part du vendeur.

SECTION II

Prise de livraison

Article 60

L'obligation de l'acheteur de prendre livraison consiste :

a) à accomplir tout acte qu'on peut raisonnablement attendre de lui pour permettre au vendeur d'effectuer la livraison; et

b) à retirer les marchandises.

SECTION III

Moyens dont dispose le vendeur en cas de contravention au contrat par l'acheteur

Article 61

1. Si l'acheteur n'a pas exécuté l'une quelconque des obligations résultant pour lui du contrat de vente ou de la présente Convention, le vendeur est fondé à :

a) exercer les droits prévus aux articles 62 à 65;

b) demander les dommages-intérêts prévus aux articles 74 à 77.

2. Le vendeur ne perd pas le droit de demander des dommages-intérêts lorsqu'il exerce son droit de recourir à un autre moyen.

3. No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

3. Aucun délai de grâce ne peut être accordé à l'acheteur par un juge ou par un arbitre lorsque le vendeur se prévaut d'un des moyens dont il dispose en cas de contravention du contrat.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 62

Le vendeur peut exiger de l'acheteur le paiement du prix, la prise de livraison des marchandises ou l'exécution des autres obligations de l'acheteur, à moins qu'il ne se soit prévalu d'un moyen incompatible avec ces exigences.

Article 63

1. The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

2. Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 63

1. Le vendeur peut impartir à l'acheteur un délai supplémentaire de durée raisonnable pour l'exécution de ses obligations.

2. A moins qu'il n'ait reçu de l'acheteur une notification l'informant que celui-ci n'exécuterait pas ses obligations dans le délai ainsi imparti, le vendeur ne peut, avant l'expiration de ce délai, se prévaloir d'aucun des moyens dont il dispose en cas de contravention au contrat. Toutefois, le vendeur ne perd pas, de ce fait, le droit de demander des dommages-intérêts pour retard dans l'exécution.

Article 64

1. - The seller may declare the contract avoided:

(*a*) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

Article 64

1. Le vendeur peut déclarer le contrat résolu :

a) si l'inexécution par l'acheteur de l'une quelconque des obligations résultant pour lui du contrat ou de la présente Convention constitue une contravention essentielle au contrat; ou

(*b*) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph 1 of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

2. However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(*a*) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(*b*) in respect of any breach other than late performance by the buyer, within a reasonable time:

(*i*) after the seller knew or ought to have known of the breach; or

(*ii*) after the expiration of any additional period of time fixed by the seller in accordance with paragraph 1 of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

1. If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may

b) si l'acheteur n'exécute pas son obligation de payer le prix ou ne prend pas livraison des marchandises dans le délai supplémentaire imparti par le vendeur conformément au paragraphe 1 de l'article 63 ou s'il déclare qu'il ne le fera pas dans le délai ainsi imparti.

2. Cependant, lorsque l'acheteur a payé le prix, le vendeur est déchu du droit de déclarer le contrat résolu s'il ne l'a pas fait :

a) en cas d'exécution tardive par l'acheteur, avant d'avoir su qu'il y avait eu exécution; ou

b) en cas de contravention par l'acheteur autre que l'exécution tardive, dans un délai raisonnable :

i) à partir du moment où le vendeur a eu connaissance ou aurait dû avoir connaissance de cette contravention; ou

ii) après l'expiration de tout délai supplémentaire imparti par le vendeur conformément au paragraphe 1 de l'article 63 ou après que l'acheteur a déclaré qu'il n'exécuterait pas ses obligations dans ce délai supplémentaire.

Article 65

1. Si le contrat prévoit que l'acheteur doit spécifier la forme, la mesure ou d'autres caractéristiques des marchandises et si l'acheteur n'effectue pas cette spécification à la date convenue ou dans un délai raisonnable à compter de la réception d'une demande du vendeur, celui-ci peut, sans préjudice de

have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

2. If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

CHAPTER IV

PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

1. If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

tous autres droits qu'il peut avoir, effectuer lui-même cette spécification d'après les besoins de l'acheteur dont il peut avoir connaissance.

2. Si le vendeur effectue lui-même la spécification, il doit en faire connaître les modalités à l'acheteur et lui impartir un délai raisonnable pour une spécification différente. Si, après réception de la communication du vendeur, l'acheteur n'utilise pas cette possibilité dans le délai ainsi imparti, la spécification effectuée par le vendeur est définitive.

CHAPITRE IV

TRANSFERT DES RISQUES

Article 66

La perte ou la détérioration des marchandises survenue après le transfert des risques à l'acheteur ne libère pas celui-ci de son obligation de payer le prix, à moins que ces événements ne soient dus à un fait du vendeur.

Article 67

1. Lorsque le contrat de vente implique un transport des marchandises et que le vendeur n'est pas tenu de les remettre en un lieu déterminé, les risques sont transférés à l'acheteur à partir de la remise des marchandises au premier transporteur pour transmission à l'acheteur conformément au contrat de vente. Lorsque le vendeur est tenu de remettre les marchandises à un transporteur en un lieu déterminé, les risques ne sont pas transférés à l'acheteur tant que les marchandises n'ont pas été remises au transporteur en ce lieu. Le fait que le vendeur soit autorisé à conserver les documents re-

2. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

présentatifs des marchandises n'affecte pas le transfert des risques.

2. Cependant, les risques ne sont pas transférés à l'acheteur tant que les marchandises n'ont pas été clairement identifiées aux fins du contrat, que ce soit par l'apposition d'un signe distinctif sur les marchandises, par des documents de transport, par un avis donné à l'acheteur ou par tout autre moyen.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 68

En ce qui concerne les marchandises vendues en cours de transport, les risques sont transférés à l'acheteur à partir du moment où le contrat est conclu. Toutefois, si les circonstances l'impliquent, les risques sont à la charge de l'acheteur à compter du moment où les marchandises ont été remises au transporteur qui a émis les documents constatant le contrat de transport. Néanmoins, si, au moment de la conclusion de contrat de vente, le vendeur avait connaissance ou aurait dû avoir connaissance du fait que les marchandises avaient péri ou avaient été détériorées et qu'il n'en a pas informé l'acheteur, la perte ou la détérioration est à la charge du vendeur.

Article 69

1. In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

2. However, if the buyer is bound to take over the goods at a place other

Article 69

1. Dans les cas non visés par les articles 67 et 68, les risques sont transférés à l'acheteur lorsqu'il retire les marchandises ou, s'il ne le fait pas en temps voulu, à partir du moment où les marchandises sont mises à sa disposition et où il commet une contravention au contrat en n'en prenant pas livraison.

2. Cependant, si l'acheteur est tenu de retirer les marchandises en un lieu au-

than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

3. If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

CHAPTER V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I

Anticipatory breach and instalment contracts

Article 71

1. A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(*a*) a serious deficiency in his ability to perform or in his credit-worthiness; or

(*b*) his conduct in preparing to perform or in performing the contract.

tre qu'un établissement du vendeur, les risques sont transférés lorsque la livraison est due et que l'acheteur sait que les marchandises sont mises à sa disposition en ce lieu.

3. Si la vente porte sur des marchandises non encore individualisées, les marchandises ne sont réputées avoir été mises à la disposition de l'acheteur que lorsqu'elles ont été clairement identifiées aux fins du contrat.

Article 70

Si le vendeur a commis une contravention essentielle au contrat, les dispositions des articles 67, 68 et 69 ne portent pas atteinte aux moyens dont l'acheteur dispose en raison de cette contravention.

CHAPITRE V

DISPOSITIONS COMMUNES AUX OBLIGATIONS DU VENDEUR ET DE L'ACHETEUR

SECTION I

Contravention anticipée et contrats à livraisons successives

Article 71

1. Une partie peut différer l'exécution de ses obligations lorsqu'il apparaît, après la conclusion du contrat, que l'autre partie n'exécutera pas une partie essentielle de ses obligations du fait :

a) d'une grave insuffisance dans la capacité d'exécution de cette partie ou sa solvabilité; ou

b) de la manière dont elle s'apprête à exécuter ou exécute le contrat.

2. If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

2. Si le vendeur a déjà expédié les marchandises lorsque se révèlent les raisons prévues au paragraphe précédent, il peut s'opposer à ce que les marchandises soient remises à l'acheteur, même si celui-ci détient un document lui permettant de les obtenir. Le présent paragraphe ne concerne que les droits respectifs du vendeur et de l'acheteur sur les marchandises.

3. A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

3. La partie qui diffère l'exécution, avant ou après l'expédition des marchandises, doit adresser immédiatement une notification à cet effet à l'autre partie, et elle doit procéder à l'exécution si l'autre partie donne des assurances suffisantes de la bonne exécution de ses obligations.

Article 72

1. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

2. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

3. The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 72

1. Si, avant la date de l'exécution du contrat, il est manifeste qu'une partie commettra une contravention essentielle au contrat, l'autre partie peut déclarer celui-ci résolu.

2. Si elle dispose du temps nécessaire, la partie qui a l'intention de déclarer le contrat résolu doit le notifier à l'autre partie dans des conditions raisonnables pour lui permettre de donner des assurances suffisantes de la bonne exécution de ses obligations.

3. Les dispositions du paragraphe précédent ne s'appliquent pas si l'autre partie a déclaré qu'elle n'exécuterait pas ses obligations.

Article 73

1. In the case of a contract for delivery of goods by instalments, if the failure of

Article 73

1. Dans les contrats à livraisons successives, si l'inexécution par l'une des par-

one party to perform any of his obligation in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

2. If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

3. A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

SECTION II

Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

ties d'une obligation relative à une livraison constitue une contravention essentielle au contrat en ce qui concerne cette livraison, l'autre partie peut déclarer le contrat résolu pour ladite livraison.

2. Si l'inexécution par l'une des parties d'une obligation relative à une livraison donne à l'autre partie de sérieuses raisons de penser qu'il y aura contravention essentielle au contrat en ce qui concerne des obligations futures, elle peut déclarer le contrat résolu pour l'avenir, à condition de le faire dans un délai raisonnable.

3. L'acheteur qui déclare le contrat résolu pour une livraison peut, en même temps, le déclarer résolu pour les livraisons déjà reçues ou pour les livraisons futures si, en raison de leur connexité, ces livraisons ne peuvent être utilisées aux fins envisagées par les parties au moment de la conclusion du contrat.

SECTION II

Dommages-intérêts

Article 74

Les dommages-intérêts pour une contravention au contrat commise par une partie sont égaux à la perte subie et au gain manqué par l'autre partie par suite de la contravention. Ces dommages-intérêts ne peuvent être supérieurs à la perte subie et au gain manqué que la partie en défaut avait prévus ou aurait dû prévoir au moment de la conclusion du contrat, en considérant les faits dont elle avait connaissance ou aurait dû avoir connaissance,

comme étant des conséquences possibles de la contravention au contrat.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 75

Lorsque le contrat est résolu et que, d'une manière raisonnable et dans un délai raisonnable après la résolution, l'acheteur a procédé à un achat de remplacement ou le vendeur à une vente compensatoire, la partie qui demande des dommages-intérêts peut obtenir la différence entre le prix du contrat et le prix de l'achat de remplacement ou de la vente compensatoire ainsi que tous autres dommages-intérêts qui peuvent être dus en vertu de l'article 74.

Article 76

1. If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

2. For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at

Article 76

1. Lorsque le contrat est résolu et que les marchandises ont un prix courant, la partie qui demande des dommages-intérêts peut, si elle n'a pas procédé à un achat de remplacement ou à une vente compensatoire au titre de l'article 75, obtenir la différence entre le prix fixé dans le contrat et le prix courant au moment de la résolution ainsi que tous autres dommages-intérêts qui peuvent être dus au titre de l'article 74. Néanmoins, si la partie qui demande des dommages-intérêts a déclaré le contrat résolu après avoir pris possession des marchandises, c'est le prix courant au moment de la prise de possession qui est applicable et non pas le prix courant au moment de la résolution.

2. Aux fins du paragraphe précédent, le prix courant est celui du lieu où la livraison des marchandises aurait dû être effectuée ou, à défaut de prix courant en ce lieu, le prix courant pratiqué

that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

SECTION III

Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

SECTION IV

Exemptions

Article 79

1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

en un autre lieu qu'il apparaît raisonnable de prendre comme lieu de référence, en tenant compte des différences dans les frais de transport des marchandises.

Article 77

La partie qui invoque la contravention au contrat doit prendre les mesures raisonnables, eu égard aux circonstances, pour limiter la perte, y compris le gain manqué, résultant de la contravention. Si elle néglige de le faire, la partie en défaut peut demander une réduction des dommages-intérêts égale au montant de la perte qui aurait dû être évitée.

SECTION III

Intérêts

Article 78

Si une partie ne paie pas le prix ou toute autre somme due, l'autre partie a droit à des intérêts sur cette somme, sans préjudice des dommages-intérêts qu'elle serait fondée à demander en vertu de l'article 74.

SECTION IV

Exonération

Article 79

1. Une partie n'est pas responsable de l'inexécution de l'une quelconque de ses obligations si elle prouve que cette inexécution est due à un empêchement indépendant de sa volonté et que l'on ne pouvait raisonnablement attendre d'elle qu'elle le prenne en considération au moment de la conclusion du contrat, qu'elle le prévienne ou le surmonte ou qu'elle en prévienne ou surmonte les conséquences.

2. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(*a*) he is exempt under the preceding paragraph; and

(*b*) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

3. The exemption provided by this article has effect for the period during which the impediment exists.

4. The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

5. Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

2. Si l'inexécution par une partie est due à l'inexécution par un tiers qu'elle a chargé d'exécuter tout ou partie du contrat, cette partie n'est exonérée de sa responsabilité que dans le cas :

a) où elle l'est en vertu des dispositions du paragraphe précédent; et

b) où le tiers serait lui aussi exonéré si les dispositions de ce paragraphe lui étaient appliquées.

3. L'exonération prévue par le présent article produit effet pendant la durée de l'empêchement.

4. La partie qui n'a pas exécuté doit avertir l'autre partie de l'empêchement et de ses effets sur sa capacité d'exécuter. Si l'avertissement n'arrive pas à destination dans un délai raisonnable à partir du moment où la partie qui n'a pas exécuté a connu ou aurait dû connaître l'empêchement, celle-ci est tenue à des dommages-intérêts du fait de ce défaut de réception.

5. Les dispositions du présent article n'interdisent pas à une partie d'exercer tous ses droits autres que celui d'obtenir des dommages-intérêts en vertu de la présente Convention.

Article 80

Une partie ne peut pas se prévaloir d'une inexécution par l'autre partie dans la mesure où cette inexécution est due à un acte ou à une omission de sa part.

SECTION V

Effects of avoidance

Article 81

1. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

2. A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

1. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

2. The preceding paragraph does not apply:

(*a*) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

SECTION V

Effets de la résolution

Article 81

1. La résolution du contrat libère les deux parties de leurs obligations, sous réserve des dommages-intérêts qui peuvent être dus. Elle n'a pas d'effet sur les stipulations du contrat relatives au règlement des différends ou aux droits et obligations des parties en cas de résolution.

2. La partie qui a exécuté le contrat totalement ou partiellement peut réclamer restitution à l'autre partie de ce qu'elle a fourni ou payé en exécution du contrat. Si les deux parties sont tenues d'effectuer des restitutions, elles doivent y procéder simultanément.

Article 82

1. L'acheteur perd le droit de déclarer le contrat résolu ou d'exiger du vendeur la livraison de marchandises de remplacement s'il lui est impossible de restituer les marchandises dans un état sensiblement identique à celui dans lequel il les a reçues.

2. Le paragraphe précédent ne s'applique pas :

a) si l'impossibilité de restituer les marchandises ou de les restituer dans un état sensiblement identique à celui dans lequel l'acheteur les a reçues n'est pas due à un acte ou à une omission de sa part;

(*b*) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(*c*) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

b) si les marchandises ont péri ou sont détériorées, en totalité ou en partie, en conséquence de l'examen prescrit à l'article 36; ou

c) si l'acheteur, avant le moment où il a constaté ou aurait dû constater le défaut de conformité, a vendu tout ou partie des marchandises dans le cadre d'une opération commerciale normale ou a consommé ou transformé tout ou partie des marchandises conformément à l'usage normal.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 83

L'acheteur qui a perdu le droit de déclarer le contrat résolu ou d'exiger du vendeur la livraison de marchandises de remplacement en vertu de l'article 82 conserve le droit de se prévaloir de tous les autres moyens qu'il tient du contrat et de la présente Convention.

Article 84

1. If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

2. The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(*a*) if he must make restitution of the goods or part of them; or

(*b*) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the

Article 84

1. Si le vendeur est tenu de restituer le prix, il doit aussi payer des intérêts sur le montant de ce prix à compter du jour du paiement.

2. L'acheteur doit au vendeur l'équivalent de tout profit qu'il a retiré des marchandises ou d'une partie de celles-ci :

a) lorsqu'il doit les restituer en tout ou en partie; ou

b) lorsqu'il est dans l'impossibilité de restituer tout ou partie des marchandises ou de les restituer en tout ou en partie dans un état sensiblement identique à celui dans lequel il les a reçues et que néanmoins il a déclaré le contrat résolu ou a exigé

seller to deliver substitute goods.

SECTION VI

Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

1. If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

2. If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf

du vendeur la livraison de marchandises de remplacement.

SECTION VI

Conservation des marchandises

Article 85

Lorsque l'acheteur tarde à prendre livraison des marchandises ou qu'il n'en paie pas le prix, alors que le paiement du prix et la livraison doivent se faire simultanément, le vendeur, s'il a les marchandises en sa possession ou sous son contrôle, doit prendre les mesures raisonnables, eu égard aux circonstances, pour en assurer la conservation. Il est fondé à les retenir jusqu'à ce qu'il ait obtenu de l'acheteur le remboursement de ses dépenses raisonnables.

Article 86

1. Si l'acheteur a reçu les marchandises et entend exercer tout droit de les refuser en vertu du contrat ou de la présente Convention, il doit prendre les mesures raisonnables, eu égard aux circonstances, pour en assurer la conservation. Il est fondé à les retenir jusqu'à ce qu'il ait obtenu du vendeur le remboursement de ses dépenses raisonnables.

2. Si les marchandises expédiées à l'acheteur ont été mises à sa disposition à leur lieu de destination et si l'acheteur exerce le droit de les refuser, il doit en prendre possession pour le compte du vendeur à condition de pouvoir le faire sans paiement du prix et sans inconvénients ou frais déraisonnables. Cette disposition ne s'applique pas si le vendeur est présent au lieu de destination ou s'il y a en ce lieu

is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

une personne ayant qualité pour prendre les marchandises en charge pour son compte. Les droits et obligations de l'acheteur qui prend possession des marchandises en vertu du présent paragraphe sont régis par le paragraphe précédent.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 87

La partie qui est tenue de prendre des mesures pour assurer la conservation des marchandises peut les déposer dans les magasins d'un tiers aux frais de l'autre partie, à condition que les frais qui en résultent ne soient pas déraisonnables.

Article 88

1. A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

2. If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

3. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable

Article 88

1. La partie qui doit assurer la conservation des marchandises conformément aux articles 85 ou 86 peut les vendre par tous moyens appropriés si l'autre partie a apporté un retard déraisonnable à prendre possession des marchandises ou à les reprendre ou à payer le prix ou les frais de leur conservation, sous réserve de notifier à cette autre partie, dans des conditions raisonnables, son intention de vendre.

2. Lorsque les marchandises sont sujettes à une détérioration rapide ou lorsque leur conservation entraînerait des frais déraisonnables, la partie qui est tenue d'assurer la conservation des marchandises conformément aux articles 85 ou 86 doit raisonnablement s'employer à les vendre. Dans la mesure du possible, elle doit notifier à l'autre partie son intention de vendre.

3. La partie qui vend les marchandises a le droit de retenir sur le produit de la vente un montant égal aux frais raison-

expenses of preserving the goods and of selling them. He must account to the other party for the balance.

nables de conservation et de vente des marchandises. Elle doit le surplus à l'autre partie.

PART IV

FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

1. This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

2. This Convention is subject ~~to~~ ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

QUATRIÈME PARTIE

DISPOSITIONS FINALES

Article 89

Le Secrétaire général de l'Organisation des Nations Unies est désigné comme dépositaire de la présente Convention.

Article 90

La présente Convention ne prévaut pas sur un accord international déjà conclu ou à conclure qui contient des dispositions concernant les matières régies par la présente Convention, à condition que les parties au contrat aient leur établissement dans des États parties à cet accord.

Article 91

1. La présente Convention sera ouverte à la signature à la séance de clôture de la Conférence des Nations Unies sur les contrats de vente internationale de marchandises et restera ouverte à la signature de tous les États au Siège de l'Organisation des Nations Unies, à New York, jusqu'au 30 septembre 1981.

2. La présente Convention est sujette à ratification, acceptation ou approbation par les États signataires.

3. La présente Convention sera ouverte à l'adhésion de tous les États qui ne sont pas signataires, à partir de la date à laquelle elle sera ouverte à la signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

4. Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

Article 92

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

2. A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph 1 of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 92

1. Tout État contractant pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer qu'il ne sera pas lié par la deuxième partie de la présente Convention ou qu'il ne sera pas lié par la troisième partie de la présente Convention.

2. Un État contractant qui fait, en vertu du paragraphe précédent, une déclaration à l'égard de la deuxième partie ou de la troisième partie de la présente Convention ne sera pas considéré comme étant un État contractant, au sens du paragraphe 1 de l'article premier de la Convention, pour les matières régies par la partie de la Convention à laquelle cette déclaration s'applique.

Article 93

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

Article 93

1. Tout État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles, selon sa constitution, des systèmes de droit différents s'appliquent dans les matières régies par la présente Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou plusieurs d'entre elles et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 94

1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of

2. Ces déclarations seront notifiées . dépositaire et désigneront expre sément les unités territoriales au quelles la Convention s'applique.

3. Si, en vertu d'une déclaration fai conformément au présent article, présente Convention s'applique l'une ou plusieurs des unités territ riales d'un État contractant, mais ne pas à toutes, et si l'établissement d'u partie au contrat est situé dans c État, cet établissement sera considér aux fins de la présente Conventio comme n'étant pas situé dans un Ét contractant, à moins qu'il ne soit sit dans une unité territoriale à laquelle Convention s'applique.

4. Si un État contractant ne fait pas o déclaration en vertu du paragraphe du présent article, la Convention s'ap pliquera à l'ensemble du territoire d cet État.

Article 94

1. Deux ou plusieurs États contractan qui, dans des matières régies par l présente Convention, appliquent de règles juridiques identiques ou voi sines peuvent, à tout moment, déclare que la Convention ne s'appliquera pa aux contrats de vente ou à leur forma tion lorsque les parties ont leur établis sement dans ces États. De telle déclarations peuvent être faite conjointement ou être unilatérales e réciproques.

2. Un État contractant qui, dans de matières régies par la présente Con vention, applique des règles juridique identiques ou voisines de celles d'un o de plusieurs États non contractant peut, à tout moment, déclarer que l

sale or to their formation where the parties have their places of business in those States.

Convention ne s'appliquera pas aux contrats de vente ou à leur formation lorsque les parties ont leur établissement dans ces États.

3. If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

3. Lorsqu'un État à l'égard duquel une déclaration a été faite en vertu du paragraphe précédent devient par la suite un État contractant, la déclaration mentionnée aura, à partir de la date à laquelle la présente Convention entrera en vigueur à l'égard de ce nouvel État contractant, les effets d'une déclaration faite en vertu du paragraphe 1, à condition que le nouvel État contractant s'y associe ou fasse une déclaration unilatérale à titre réciproque.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 1 (*b*) of article 1 of this Convention.

Article 95

Tout État peut déclarer, au moment du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion, qu'il ne sera pas lié par l'alinéa *b* du paragraphe 1 de l'article premier de la présente Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 96

Tout État contractant dont la législation exige que les contrats de vente soient conclus ou constatés par écrit peut à tout moment déclarer, conformément à l'article 12, que toute disposition de l'article 11, de l'article 29 ou de la deuxième partie de la présente Convention autorisant une forme autre que la forme écrite pour la conclusion, la modification ou la résiliation amiable d'un contrat de vente, ou pour toute offre, acceptation ou autre manifestation d'intention, ne s'applique pas dès lors que l'une des parties a son établissement dans cet État.

Article 97

1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration

Article 97

1. Les déclarations faites en vertu de la présente Convention lors de la signature sont sujettes à confirmation lors de la ratification, de l'acceptation ou de l'approbation.

2. Les déclarations, et la confirmation des déclarations, seront faites par écrit et formellement notifiées au dépositaire.

3. Les déclarations prendront effet à la date de l'entrée en vigueur de la présente Convention à l'égard de l'État déclarant. Cependant, les déclarations dont le dépositaire aura reçu notification formelle après cette date prendront effet le premier jour du mois suivant l'expiration d'un délai de six mois à compter de la date de leur réception par le dépositaire. Les déclarations unilatérales et réciproques faites en vertu de l'article 94 prendront effet le premier jour du mois suivant l'expiration d'une période de six mois après la date de la réception de la dernière déclaration par le dépositaire.

4. Tout État qui fait une déclaration en vertu de la présente Convention peut à tout moment la retirer par une notification formelle adressée par écrit au dépositaire. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de six mois après la date de réception de la notification par le dépositaire.

5. Le retrait d'une déclaration faite en vertu de l'article 94 rendra caduque, à partir de la date de sa prise d'effet, toute déclaration réciproque faite par

made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

1. This Convention enters into force, subject to the provisions of paragraph 6 of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph 6 of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on

un autre État en vertu de ce même article.

Article 98

Aucune réserve n'est autorisée autre que celles qui sont expressément autorisées par la présente Convention.

Article 99

1. La présente Convention entrera en vigueur, sous réserve des dispositions du paragraphe 6 du présent article, le premier jour du mois suivant l'expiration d'une période de douze mois après la date du dépôt du dixième instrument de ratification, d'acceptation, d'approbation ou d'adhésion, y compris tout instrument contenant une déclaration faite en vertu de l'article 92.

2. Lorsqu'un État ratifiera, acceptera ou approuvera la présente Convention ou y adhérera après le dépôt du dixième instrument de ratification, d'acceptation, d'approbation ou d'adhésion, la Convention, à l'exception de la partie exclue, entrera en vigueur à l'égard de cet État, sous réserve des dispositions du paragraphe 6 du présent article, le premier jour du mois suivant l'expiration d'une période de douze mois après la date du dépôt de l'instrument de ratification, d'acceptation, d'approbation ou d'adhésion.

3. Tout État qui ratifiera, acceptera ou approuvera la présente Convention ou y adhérera et qui est partie à la Convention portant loi uniforme sur la formation des contrats de vente internationale des objets mobiliers corporels faite à La Haye le 1er juillet 1964 (Convention de La Haye de 1964 sur la formation) ou à la Convention

the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

portant loi uniforme sur la vente internationale des objets mobiliers corporels faite à La Haye le 1er juillet 1964 (Convention de La Haye de 1964 sur la vente), ou à ces deux conventions, dénoncera en même temps, selon le cas, la Convention de La Haye de 1964 sur la vente ou la Convention de La Haye sur la formation, ou ces deux conventions, en adressant une notification à cet effet au Gouvernement néerlandais.

4. A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

4. Tout État partie à la Convention de La Haye de 1964 sur la vente qui ratifiera, acceptera ou approuvera la présente Convention ou y adhérera et qui déclarera ou aura déclaré en vertu de l'article 92 qu'il n'est pas lié par la deuxième partie de la Convention, dénoncera, au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, la Convention de La Haye de 1964 sur la vente en adressant une notification à cet effet au Gouvernement néerlandais.

5. A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

5. Tout État partie à la Convention de La Haye de 1964 sur la vente qui ratifiera, acceptera ou approuvera la présente Convention ou y adhérera et qui déclarera ou aura déclaré en vertu de l'article 92 qu'il n'est pas lié par la troisième partie de la Convention, dénoncera, au moment de la ratification, de l'acceptation , de l'approbation ou de l'adhésion, la Convention de La Haye de 1964 sur la formation en adressant une notification à cet effet au Gouvernement néerlandais.

6. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964

6. Aux fins du présent article, les ratifications, acceptations, approbations et adhésions effectuées à l'égard de la présente Convention par des États parties à la Convention de La Haye de

Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

Article 100

1. This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph 1 (*a*) or the Contracting State referred to in subparagraph 1 (*b*) of article 1.

2. This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph 1 (*a*) or the Contracting State referred to in subparagraph 1 (*b*) of article 1.

Article 101

1. A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for

1964 sur la formation ou à la Convention de La Haye de 1964 sur la vente ne prendront effet qu'à la date à laquelle les dénonciations éventuellement requises de la part desdits États à l'égard de ces deux conventions auront elles-mêmes pris effet. Le dépositaire de la présente Convention s'entendra avec le Gouvernement néerlandais, dépositaire des conventions de 1964, pour assurer la coordination nécessaire à cet égard.

Article 100

1. La présente Convention s'applique à la formation des contrats conclus à la suite d'une proposition intervenue après l'entrée en vigueur de la Convention à l'égard des États contractants visés à l'alinéa *a* du paragraphe 1 de l'article premier ou de l'État contractant visé à l'alinéa *b* du paragraphe 1 de l'article premier.

2. La présente Convention s'applique uniquement aux contrats conclus après son entrée en vigueur à l'égard des États contractants visés à l'alinéa *a* du paragraphe 1 de l'article premier ou de l'État contractant visé à l'alinéa *b* du paragraphe 1 de l'article premier.

Article 101

1. Tout État contractant pourra dénoncer la présente Convention, ou la deuxième ou la troisième partie de la Convention, par une notification formelle adressée par écrit au dépositaire.

2. La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois après la date de réception de la notification par le dépositaire. Lorsqu'une

the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Done at Vienna, this eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification.

Fait à Vienne, le onze avril mil neuf cent quatre-vingt, en un seul original, dont les textes anglais, arabe, chinois, espagnol, français et russe sont également authentiques.